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NO. 1703.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE CITY OF HELENA, (A Municipal Corporation),
Appellant,

vs.

HELENA WATER WORKS, (A Corporation),
Appellee.

BRIEF OF APPELLANT.

EDWARD HORSKY,
Solicitor for Appellant.

C. A. LOOMIS,
Of Counsel.

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APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is an appeal from an interlocutory injunction issued on Feb. 11, 1909, by the U. S. Circuit Court of Montana, enjoining the City of Helena from issuing or selling $600,000 of its water bonds, and from making any contract or incurring any indebtedness for a water system or supply, and from collecting from the complainant a tax of one mill, or any other amount, for the payment of interest upon said bonds. (Tr. 256).

It should be observed at the outset that all questions presented by the record other than that of jurisdition, and the scope of the interlocutory injunction issued on February 11, 1909, have probably been eliminated by the repeal on March 1, 1909, of the water bond ordinance No. 742, (passed September 24, 1908), which last mentioned ordinance was the one authorizing the issuance of bonds referred to in the record.

On March 1, 1909, the city council adopted another ordinance, No. 743, for the issuance of a like amount of water bonds to obviate some of the objections urged to the bonds proposed to be issued under the first ordinance passed September 24, 1908; and which said first bonds are the subject of investigation in the record at bar. The record does not, of course, disclose said repealing ordinance of March 1, 1909, nor the passage of the new bond ordinance No. 743, but we deem it proper to suggest this to the court, so that there may be no misunderstanding or misconception as to our position, and to the further end that the validity or invalidity of said first bonds, (those described in the record) may not be merely a moot question.

Moreover, on May 1, 1909, the Supreme Court of Montana decided the case of Carlson v. The City of Helena, involving the validity of the said bonds authorized by the ordinance passed March 1, 1909, affirming a judgment of the State District Court enjoining the issuance of said bonds. No opinion has yet been handed

down, but as soon as it will have been rendered we shall file copies thereof.

We have, therefore, deemed it proper to invite Your Honors' attention to this feature and have prepared a statement of only those facts regarded as essential and material to the questions properly to be considered on this appeal.

The purpose of this action is stated in the opening paragraph, supra.

In Montana, the constitutional limit of indebtedness of cities for ordinary purposes is three per cent of the last assessment theretofore for state and county purposes. Such debt limit may, however, be extended by submitting the question to the taxpayers affected thereby for two purposes, namely: A water system and supply, or a sewer system.

On March 3, 1908, the city council passed ordinance No. 717, authorizing a special election to be held April 25th, 1908, for the purpose of submitting to the taxpayers affected thereby the question of whether the indebtedness of said city should be increased over and above the three per cent limit by the issuance of water bonds to the amount of $600,000, to be used for the purpose of procuring a water supply for said city from McClellan Creek and a water system, which water supply and system the said city shall own and control, and $70,000 of sewer bonds to be used for the purpose

of constructing an addition to the sewer system. (Tr. 30; also 96.)

Pursuant to said ordinance, the city clerk, commencing April 4, 1908, posted and published notices of such election to and including April 25th, 1908, and also published notice of registration from April 16th to April 25th, and on said date last mentioned the election was held, (Tr. 5) and both questions carried (Tr. 5) by large majorities, to-wit, 417 in favor of said water bonds and 111 against; and 403 in favor of the sewer bonds and 119 against. (Tr. 190). Said result was duly canvassed and declared carried by the council (Tr. 190; Exhibit "1", tr. 201).

Accordingly, on September 24th, 1908, ordinance No. 742, entitled "an ordinance to provide for the issue of $600,000 bonds of the City of Helena, Montana, for the purpose of procuring a water supply and constructing a water system" for said city was passed and approved (Tr. 6; Exhibit "C", Tr. 36.)

At the same meeting Resolution No. 717 was passed and approved, entitled "a Resolution amending Resolution No. 835, entitled 'a resolution levying taxes for municipal and administrative purposed for the fiscal year 1908'" and which provided among other things for the levying of a special tax, viz: "For the payment of interest upon the water bonds one (1) mill." This resolution is set forth in full in the body of the original bill of complaint, Para. 20, (Tr. 8-10). At

said meeting the council also adopted plans and specifications, form of advertisement, form of contract for the construction of a water system, (Tr. 6) and pursuant thereto the city clerk advertised for bids.

On October 30, 1908, the council awarded the contract to the American Light & Water Co., the lowest bidder for $529,940 (Tr. 65; Ex. E, Tr. 111); said contract (the form of which had been adopted prior to publishing the advertisement) containing the following condition:

> "It is hereby mutually understood and agreed between the parties hereto that whereas the said city must provide the funds for making all payments hereunder from the sale of bonds issued or to be issued by said city, and whereas said bonds have not yet been sold, said contractor shall not be required to perform any of the conditions of the agreement until said bonds shall have been sold by said city, and that within five days after the sale of said bonds by said city, the said city shall cause written notice of such sale to be served upon the contractor who shall forthwith keep and perform all of the conditions and terms thereof. In case said city shall fail to sell said bonds on or before July 1st, 1909, then this contract shall become null and void." (Tr. 113).

On October 28, 1908, (Tr. 46), complainant filed its bill of complaint, but not until November 11th, did it apply for and obtain an order to show cause why a preliminary injunction should not issue (Tr. 46), on

which date an order was issued, setting November 14th, 1908, as the time for such hearing, when the matter coming on to be heard such application was by the court denied on November 16, 1908. (Tr. 57).

Thereafter at noon, November 16, 1908, the city offered for sale at public auction its water bonds in said amount of $600,000 (Tr. 71) and the American Light & Water Company made what was afterwards held by the court to be a conditional bid for said bonds; a copy of said bid being contained in Exhibit D. (Tr. 109), the condition being as follows:

> "The legality of said bonds shall be approved as being legally valid and binding obligations of the City of Helena, State of Montana, by our counsel Messrs. Dillon & Hubbard, of New York City, and Charles A. Loomis of Kansas City, Missouri."

Thereafter the complainant filed its amended bill of complaint (Tr. 57) attacking the validity of said bond sale.

On December 17th, 1908, a stipulation was filed that said American Light & Water Company, an Indiana corporation, might be made a party defendant (Tr. 128) and an order was made accordingly. (Tr. 130.)

On the same day said company and the city filed separate answers to said amended bill (Tr. 131, 160).

November 14th, amendments were filed by complainant to its bill, (Tr. 48), and amendments to its

amended bill of complaint on December 17, (Tr. 117) and January 4th, 1909, (Tr. 236).

Thereupon the city filed amendments to its answer, and also answers to said amendments. (Tr. 239, 242, 245).

On January 6, the defendant city by plea objected to the jurisdiction of the court upon the averments of the bill as amended and amendments thereto, together with the facts set forth in the answer, the latter being taken as true, for the purpose of the hearing, (Tr. 238), and said plea was on January 26th overruled. (Tr. 244).

The two principal questions presented are: Jurisdiction of the Circuit Court; and, if the court has jurisdiction, the injunction granted is too broad in its scope, in view of the written decision of the court.

The material averments in reference to jurisdiction as shown upon the face of the bill are the following:

In the original bill of complaint, in which the city was the sole and only defendant, the following are the particular averments with reference to jurisdiction:

> "3. That the matter in dispute in this suit exceeds in value the sum of $2,000 exclusive of interest and costs." (Tr. 2.)
>
> "4. That your orator is the owner and in possession of real and personal property situate in the City of Helena of the value of several hundred thousand dollars upon which taxes have been levied, assessed and collected by said city." (Tr. 2).

"21. That the assessed value of the taxable property of the said City of Helena for state and county taxes for the year 1907 was the sum of $10,799,050.-00, and the assessed value of said property as determined by the assessment-roll for State and county taxes for the year 1908 is the sum of $11,629,-834.00." (Tr. 10; also paragraph 27, amended Bill, Tr. 78).

"The passage of a resolution on September 24, 1908, levying a tax 'for the payment of interest upon the water bonds one (1) mill.'" (Tr. 8-9).

The election proceedings authorizing the additional indebtedness by the issuance of $600,000 of water bonds (Tr. 45), the passage of the ordinance for the issuance of said bonds, (Tr. 6), and

"23. That the said city claims the right and authority to issue and sell said bonds to incur said indebtedness to the amount of $600,000, by virtue of the pretended election held and the proceedings had as aforesaid." (Tr. 10; also para. 30 *amended bill* Tr. 69.).

The *Amended Bill* and amendments thereto contains the following additional allegation in the attempt to confer jurisdiction:

"40½. That if said bonds are issued and become obligations of said city the taxes on the property of your roator within said city to pay the interest on said bonds and provide a sinking fund for the redemption thereof will exceed the sum of $10,000." (Tr. 76).

In the answer it is denied:

"that the matter in dispute in this suit exceeds or amounts to the sum of two thousand dollars ($2,000) exclusive of interest and costs." (Tr. 161.)

"Or any other sum in excess of $500.00 as hereinafter in paragraph 34 of this answer as hereby amended (which paragraph is in answer to paragraph 40½ of said amended bill of complaint), alleged by this defendant, and this answering defendant hereby makes the said amended allegation of paragraph 34 of this answer a part hereof." (Tr. 242).

and it is admitted:

"That complainant is the owner and in possession of real and personal property as alleged in paragraph 4 of the amended bill of complaint." (Tr. 21).

Also the passage and adoption of the resolution levying taxes as set forth in paragraph 26 of the amended bill (Tr. 171, 172); and the assessed valuation as alleged. (Tr. 172).

"25. For answer to paragraph 30, this defendant admits that the said city did claim, has claimed and still claims, the right and authority to sell, issue and deliver (as hereinafter more fully set fort) said bonds and to incur said indebtedness to the amount of $600,000 by virtue of said election held and proceedings had as aforesaid, all as hereinafter more fully set forth, and also to collect from defendant and other taxpayers of the said

City of Helena a tax of one mill on the assessed value of their property for the year 1908, for the purpose of paying interest on said bonds and to levy and collect further taxes on their property in future years to pay the interest on said bonds and to provide for a sinking fund for their redemption, but in that behalf avers that said levy and collection of taxes will only be in such amount as is actually necessary, in the future, if at all, to provide for the interest and sinking fund, and that the revenues to be derived from said waterworks and system, when constructed and in operation must and will be devoted solely to the payment of the debt incurred therefor, and that by reason thereof and thereby any levy and collection of taxes for the payment of said bonds could only be nominal to the extent of making some levy or collection to meet the requirement of the statute in such case made and provided." (Tr. 172, 173).

"34. For answer to paragraph 40½, denies that if said bonds are issued or become obligations of said city, the taxes on property of complainant within said city to pay the interest on said bonds or provide a sinking fund for the redemption thereof, will exceed the sum of $10,000, and in that behalf alleges on information and belief that said taxes, if any, will not equal the sum of $2,000." (Tr. 181.).

"That it appears in and by the allegations of paragraph 26 of said amended bill of complaint that the city council of the City of Helena, on September 24th, 1908, passed and adopted a resolution levying taxes for the fiscal year of 1908, by which

there was levied a tax for the payment of interest upon water bonds of one mill, and that the said tax 'was levied for the purpose of securing, by collection of a tax for the amounts specified upon all of the taxable property within said City of Helena, the funds necessary to pay the interest on bonds that the said city proposed to sell, issue and deliver for the construction of said water system.' That the total assessed valuation of all the property of complainant within the City of Helena and subject to the tax above alleged and referred to for the year 1908, is the sum of $398,500.00, as shown by the completed assessment-roll of said city now on file in the office of the city treasurer of said city for the year 1908. That it therefore appears that the tax as levied upon the property of the complainant situated and taxable within the City of Helena for the fiscal year 1908 will amount to but the sum of $398.50. That the amount of $398.50 is all that is involved in this action, and this answering defendant, therefore, claims that the amount involved in this suit is not sufficient to give this Court jurisdiction to hear, consider or decide any of the questions herein involved.'' (Tr. 242-243).

SPECIFICATIONS OF ERROR

1. The Circuit Court did not have jurisdiction to hear, try or determine any of the matters involved in said suit, nor to grant the relief prayed for, nor any relief whatever in said suit, because the matter in dis-

pute in said suit did not exceed in value the sum of two thousand dollars, exclusive of interst and costs.

2. The court erred in overruling the defendant city's plea to the jurisdiction.

3. The court erred in making the interlocutory order granting an injunction in this case in that it did not have jurisdiction so to do.

4. The court erred in granting the order for the application for an injunction and in enjoining the defendant city "from making any contract or incurring any indebtedness for a water system or suppiy."

5. Assuming that the court had jurisdiction, the order granting the injunction and the writ of injunction are too broad and not warranted by the pleadings in enjoining the city "from making any contract or incurring any indebtedness for a water system or supply," and said injunction should be modified accordingly, in conformity with the written opinion of the Circuit Court therein.

BRIEF AND ARGUMENT.

The only capacity in which the complainant can claim relief is that of a taxpayer. Its status and rights under its franchise and the owner of an existing water system in the city were fully determined and finally adjudicated by this court, and, on appeal, by the United States Supreme Court, in favor of the city. (Tr. 54).

City of Helena v. Helena Waterworks Co., 122 Fed. 1;

Helena Waterworks Co. v. City of Helena, 195 U. S. 383; 49 L. ed. 245.

JURISDICTION.

The court has no jurisdiction over the subject matter of this action for the reason that the complainant's bill of complaint does not show that the amount in dispute exceeds the sum of $2,000 exclusive of interest and costs.

The bill upon its face must specifically aver facts showing jurisdiction. The allegation "that the matter in dispute in this suit exceed in value the sum of $2,000. exclusive of interest and costs," is the statement of a mere conclusion, and not of such facts as will confer jurisdiction.

In Fishbank v. Western Union Telegraph Co., 161 U. S. 96, L. Ed. Book 40 p. 630, on p. 631 Mr. Chief Justice Fuller, delivering the opinion of the court, says:

> "In Walter v. Northeastern R. Co. 147 U. S. 370, we held that 'a circuit court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments in separate counties, no one of which amounts to $2,000, and for

which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined together in the bill, making an aggregate of over $2,000.

"The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. Ex parte Smith, 94 U. S. 455 (24:165); Metcalf v. Watertown, 128 U. S. 586 (32:543)."

"The general averment in this bill that '*the amount or value in controversy in this suit exceeds the sum of $2,000, exclusive of interest and costs,' was a mere conclusion*, and it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach $2,000. If the rate of taxation in Arkansas did not exceed 2 per cent as indicated in the return of the telegraph company to the railroad commissioners, the highest amount of taxes in any one county would fall below $400."

And the amendment to the Bill in paragraph 40½ that:

"If said bonds are issued and become obligations of said city, the tax on the property of your orator within said city to pay the interest on said

bonds and provide a sinking fund for the redemption thereof will exceed the sum of $10,000,'' (Tr. 76).

Clearly does not aver any such facts as will confer jurisdiction upon the court. It does not aver the amount of the assessed value of the property of complainant whereby the amount of the tax for *any one year* could be determined by the court. Neither does complainant aver, nor could it aver, the amount of any *future* assesment or levy, or the amount of taxes which would be thereby imposed upon the complainant's property for any one year; *nor does it aver any facts from which the court could ascertain the amount of such taxes.*

On the other hand, as shown by the City's answer, the assessed valuation of complainant's property within the City of Helena, for the current year is $398,500. An assessment of one mill has been made by the City Council to pay the interest maturing upon the bonds for the ensuing year. The total amount of taxes collectible under such assessment, if the bonds are issued and delivered, is $398.50 (Tr. 242, 243). The complainant cannot add thereto the amount of taxes which, during subsequent years, may be levied and collected against the complainant in order to give the court jurisdiction.

This precise question has been passed upon by the Supreme Court of the United States in a number of cases, the most recent of which is:

Holt v. Indiana Manufacturing Co., 176 U. S. 68, L. E. Book 44, p. 374.

The court holds:

"A suit to restrain the collection of taxes not exceeding $2,000 in amount, though arising under the Constitution or laws of the United States, is not within the jurisdiction of a circuit court of the United States under the act of Congress of August 13, 1888, para. 1; *and future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute.*"

And on page 377, the court, speaking through Chief Justice Fuller, says:

"(3). Treating this bill as setting up a case arising under the Constitution or laws of the United States on the ground that the laws of Indiana authorized the taxation in question, and were therefore void because patent rights granted by the United States could not be subjected to state taxation, or because the obligation of the contract existing between the inventor and the general public would be thereby impaired, or for any other reason, the difficulty is that the pecuniary limitation of over $2,000 applied, and the taxes in question did not reach that amount. *And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute.* New England Mortg. Security Co. v. Gay, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; Clay Center v. Farmers' Loan & T. Co., 145 U. S. 224,

36 L. ed. 685, 12 Sup. Ct. Rep. 817; Citizens' Bank of Cannon, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89."

That the amount of future taxes cannot be considered or computed is particularly true in the case at bar.

Sec. 6 of Article XIII of the Constitution of Montana makes it mandatory (where the debt limit has been increased, as in the case at bar) to "*devote the revenues derived therefrom to the payment of the debt,*" while subdivision 64 of Section 3259 of the Revised Codes of 1907, does likewise in the following language: "and further provided that an additional indebtedness shall be incurred when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and *devote the revenues derived therefrom to the payment of the debt.*"

Section 3342 of the Revised Codes provides:

> "The amount to be assessed and levied for general municipal or administrative purposes may not exceed one per centum of the assessed value of the taxable property of the city or town."

Section 3344 of the Revised Codes, however, provides for taxes in cities *which have exceeded the constitutional limit of indebtedness*, as follows:

> "All taxes heretofore levied and collected or to be collected for municipal and administrative purposes by any city, the indebtedness of which

equals or exceeds the limit provided in Section 6 of Article XIII of the Constitution, may be used in payment of current expenses incurred during the fiscal year for which said taxes were levied the same as though a special levy had been made for each of said purposes. And the council of any such city is hereby authorized to designate the amount of said general levy applicable to each of said purposes, and the amount so designated shall constitute a special fund for the special purpose of paying the expenses incurred for such purposes and such expenses shall be payable out of such fund and not otherwise, provided, that the aggregate of all taxes authorized for general municipal and administrative purposes shall not exceed one (1) per cent annually upon the assessed value of all taxable property in such city or town. (Act approved March 6, 1907, Sec.1), (10th Sess. Chap. 106).

Section 3345 Revised Codes provides as follows:

"That hereafter any city, the indebtedness of which equals or exceeds said limit, shall be authorized to levy and collect special taxes for municipal and administrative purposes, and the city council in making such levy shall designate the amount thereof for each of said purposes, and each tax, when collected, shall constitute a fund out of which the expense incurred for the purpose for which such tax was levied shall be paid. The expenses incurred for any such purpose shall be paid out of the fund so to be provided therefor, and not otherwise. (Act approved February 24th, 1903, Sec. 2), (8th Sess. Chap. 21)."

Section 3358 Revised Codes provides for the *annual* tax levy as follows:

> "The council must, on or before the first Monday of October of each year, by *resolution,* determine the amount of city or town taxes for *all purposes,* to be levied and assessed on the taxable property in the city or town for the current fiscal year, and the city clerk must at once certify to the town treasurer, a copy of such resolution, and the county treasurer must collect the taxes as in this Article provided; provided, that in cities where the council has provided by ordinance for the collection of their taxes by the city treasurer, the city clerk must certify a copy of such resolution to the city treasurer. (Act approved March 3rd, 1897, Sec. 1), (5th Sess. 224)."

Section 3459 of the Revised Codes in reference to bond issues provides:

> "* * * a tax to be fixed by ordinance must be levied *each year* for the purpose of paying the interest on the bonds and to create a sinking fund for their redemption."

The City (Tr. 8, 9) levied the following tax: "for the payment of interest upon water bonds, one (1) mill."

Section 3344 and 3345 of the Revised Codes provide for taxes in cities which have exceeded the constitutional limit of indebtedness; Section 3358 provides for the *annual* tax levy, and Section 3459 provides that

the tax must be levied "*each year*" for the purpose of paying the interest on the bonds and to create a sinking fund for their redemption."

Thus the tax to be levied for the bonds, must be levied *each year*. Whether such tax would be merely nominal by reason of the revenues derived from the plant, or what would be the amount of future taxes (if anything more than nominal) would necessarily be a matter of conjecture and speculation, which cannot be indulged in, in the attempt to confer jurisdiction.

The revenues derived from the plant must be devoted to the payment of the debt, but if they are deficient, the deficiency must be made up by taxation as provided in Section 3459, supra. These are *cumulative* powers.

The conference of the one does not exclude the other.

City of Helena v. Kent, 32 Mont. 279; 80 Pac. 258.

While the revenues derived from the plant must be devoted to the payment of the debt, the *amount* of the tax to pay interest is left as above shown to the discretion of the council. It may and would probably be merely nominal each year. But this, of course, is conjectural and speculative at the best, and cannot be determined until each year comes. Nowhere has the city sought to obligate itself by an ordinance, requiring it-

self in future years to levy a given amount of taxes; nor would it have the power so to do under the statutes. Thus, the clear statutory intent is that such tax shall be levied and determined *each year*.

As tersely stated in the answer:

> "Said levy and collection of taxes will only be in such amount as is actually necessary, in the future, if at all, to provide for the interest and sinking fund, and that the revenues to be derived from said waterworks and system, when constructed and in operation must and will be devoted solely to the payment of the debt incurred therefor, and that by reason thereof and thereby any levy and collection of taxes for the payment of said bonds would only be nominal to the extent of making some levy or collection to meet the requirement of the statute in such case made and provided." (Tr. 172, 173).

Another very recent case is Fishbank v. Western Union Telegraph Co., 161 U. S. p. 96, L. ed. Book 40 p. 630.

In an opinion rendered by Chief Justice Fuller, the rule is very clearly stated, citing a number of authorities:

In Colvin v. City of Jacksonville, 158 U. S. 456, 39 L. ed. p. 1053, the court held:

> "*In a suit by a taxpayer to restrain the issue of municipal bonds, the amount of taxes which plaintiff would have to pay, and not the entire issue*

of the bonds, is the extent of his interest and the amount in controversy, and if that does not exceed $2,000, the circuit court has no jurisdiction.''

The Supreme Court in an opinion rendered by Chief Justice Fuller quotes and follows the case of:

El Paso Water Co. v. City of El Paso, 152 U. S. 157-9 L. ed. Book 38, pp. 396-7.

In the latter case the court holds:

"This court has no jurisdiction of a suit brought by a water company to which a city has granted the exclusive right to supply the city with water, for a certain time, to enjoin the city from establishing any water works within its limits, during that time, where it does not appear from the record that there is over $5000 in controversy."

In the opinion rendered by Mr. Justice Brewer the court says:

"We do not deem it necessary to consider the important constitutional question thus presented, for it does not appear from the record that there is over $5000 in controversy, as is necessary to give this court jurisdiction. *The bill is filed by the plaintiff to protect its individual interests, and to prevent damage to itself.* It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5000. *So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount*

thereof is not stated, nor any facts given from which it can be fairly inferred.''

This case is peculiarly applicable to the one at bar. There is nothing in the bill which shows upon the face of the bill the amount of taxes levied or assessed or collectible against the complainant. In order to confer jurisdiction it must affirmatively appear upon the face of the bill the amount of taxes which have been assessed or levied against the complainant exceeds the sum of $2,000 exclusive of interest and costs and future taxes which may be hereafter levied and collected, the validity of which may be indirectly affected by the decision in this case, cannot be added thereto to bring the amount up to $2,000. In both the original bill and the amended bill complainant seeks relief *in its own behalf only,* and not on behalf of othe taxpayers similarly situated.

Another case pertinent to the issues herein:

The City of Clay Center v. Farmers' Loan & T. Co., 145 U. S. 224, 36 L. ed. p. 685.

The opinion rendered by Mr. Chief Justice Fuller is short and we quote the same in full:

> ''This was a suit to recover of the city of Clay Center two installments of hydrant rental for eighteen hundred and fifty dollars each, with interest. These rentals were claimed to be due under an alleged contract in respect of the erection of water-works between the city and one Bonebrake and a water-works company, his assignee and suc-

cessor, and to be payable under said contract to the Farmers' Loan & Trust Company, trustees in a trust deed to secure bonds issued by the water-works company for the purpose of borrowing money to complete the construction of the works.

"The bill prayed that the city be decreed to have contracted with the Trust Company to pay directly to it so much of the hydrant rental as might be necessary to pay the interest on the bonds, and to pay the two installments then due with interest. The decree sustained the contract and the liability to pay the Trust Company directly and awarded recovery to the amount of $4,042.65. This was all that could be recovered in this suit, if the contract were valid and binding as found. If the circuit Court had arrived at the contrary conclusion on that point, this was all that in this suit complainant could have lost; and as in the latter contingency complainant could not have brought the case here, so defendant cannot, because the decree, which allowed all that was claimed, is for less than the jurisdictional amount. The value of the matter in dispute was the accrued rental and interest, and although the determination that such rental was due and should be paid to the trustee involved the existence and validity of the contract, yet causes of action for hydrant rental which had not accrued but might subsequently accrue cannot be availed of to make out jurisdiction of the case by this court upon appeal. New England Mortgage Security Co. v. Gay, ante, 646.

The appeal is dismissed for want of jurisdiction."

The case of New England Mortgage Security Co. v. Gay, cited and referred to in the above opinion, reported in 145 U. S. 123, 36 L. ed., p. 646, the court in its opinion rendered by Mr. Justice Brown states the rule in this language:

> "It is well settled in this court that when our jurisdiction depends upon the amount in controversy, it is determined by the amount involved in the particular case, *and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur.*"

And in the opinion the court reviews many leading authorities illustrative of the principle.

Citizens' Bank of Louisiana v. Clifton Cannon, 164 U. S. 318, 319, is a case directly in point. The court holds:

> "In an action to enjoin sheriffs of several parishes from enforcing the payment of taxes, the taxes for the several parishes cannot be added together in order to make the amount involved sufficient to confer jurisdiction on the United States circuit court.
>
> "Sufficient jurisdictional amount, in such case, cannot be arrived at by taking the tax for one year assessed and in the hands of the sheriff for collecting in a district, and assuming that the taxes for subsequent years in that district are for similar amounts, where the proof was restricted to the first year.

> "In a suit by a bank to restrain tax assessors and collectors of several parishes from collecting taxes against exempt property of the bank for specific years, jurisdiction cannot be shown by the averment that the value of the exemption during the continuance of its charter exceeds $2,000 for each parish."

And in the opinion rendered by Mr. Justice Shiras he says:

> "It is further argued that jurisdiction may be seen in the averment of the bill that the value of the exemption of the bank's property during the continuance of its charter exceeds $2,000 for each parish. But the answer to this is, that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a court to foresee what, if any, taxes may be assessed in the future."

The remarks of the court are pertinent to the issues in the case at bar. There is no averment in complainant's bill in reference to the amount of taxes that will be assessed and collected in any subsequent year, nor is it possible for the court to foresee in the nature of things what, if any, taxes may be assessed in the future against the complainant to pay the interest and principal of the bonds, or what amount of taxes may be assesed and collected during any year or any number of years.

The same principle was decided by the Supreme Court, and was by it deemed so well settled that no opinion was rendered other than citing the above cases.

Town of Weston v. Tierney No. 97, in 191 U. S. 560, L. ed. Book 48, p. 102, and

Town of Tierney No. 102, 184 U. S. 695, L. ed. Book 46, p. 763.

See also Linehan Railway Transfer Co. v. Pendergrass, Circuit Ct. of Appeals, opinion by Circuit Judge Caldwell, 70 Fed. p. 1.

> "In a suit to enjoin the collection of a tax, the amount in controversy is the amount of such tax, and the federal courts have not jurisdiction of the suit if this amount is less than $2,000, though the value of the taxed property is greater."

Eachus v. Hartwell, 112 Fed. Rep. 564, the court holds:

> "In a suit to enjoin the enforcement of an assessment for street improvements, the amount or value in controversy, for the purpose of determining whether a federal court has jurisdiction, is the amount of the assessment."

Purnell v. Page, 128 Fed. Rep. 496, the court follows the same ruling and on page 498, cites many of the leading authorities.

Wheless v. City of St. Louis, 180 U. S. 379, L. ed. Book 45, p. 583, holds:

> "*Distinct and separate interests* of complainants in a suit for relief against assessments, whether they have been made or merely threatened, *cannot be united* for the purpose of making up the amount necessary to give jurisdiction to a Circuit Court of the United States."

Waite v. Santa Cruz 184 U. S. 302, 46 L. ed. 522, holds that transferees of bonds and coupons cannot unite the amounts held by the several assignors to create the amount sufficient to maintain jurisdiction of the court.

Bernard's Township v. Stebbins, 109 U. S. 341, L. ed. Book 27, 956, holds that parties and causes of action cannot be improperly or collusively made or joined to aggregate an amount sufficient to give jurisdiction. It would thus appear impossible for a case to be made by any form of pleading under the admitted facts, either by joining other non-resident tax payers or by assigning to one claimant the interests of different non-resident tax payers joined together in the same suit to confer any jurisdiction upon this court whereby this court in legally deciding the rights of the complainants as tax payers, and whenever this case, under whatever form of pleading it may be presented, is finally heard, the appellate federal court will search the record to ascertain whether the facts confer jurisdiction, and when the admitted facts appear of record it leaves this court and every appellate federal court without the

jurisdiction to determine the merits of this controversy.

Another very recent case is:

Caffrey v. Oklahoma, 177 U. S. 346, L. ed. Book 44, p. 799. The court holds:

> "A decision requiring a county clerk to comply with an order of a territorial board of equalization increasing the assessed valuation of the property in the county does not involve any pecuniary rights of the clerk, where it does not appear that he is a property owner or taxpayer of the county, but bases his resistance to the order upon his duty as an officer; and therefore such decision is not within the jurisdiction of the United States Supreme Court on appeal from or writ of error to the supreme court of the territory.

And on page 349 in the opinion the court says:

> "However this may have justified his action of which we express no opinion, or may have caused a dispute which the territorial court had jurisdiction to pass on and determine, it does not give us jurisdiction. To justify our taking jurisdiction there must be a controversy which involves pecuniary value exceeding $5,000. to the party appealing. In other words, there must be a dispute which involves a sum in excess of $5,000. and such sum, or property of its value, must be taken from him by the judgment which he seeks to review.
>
> "Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866, is in point. It was a suit in equity to restrain the issue of bonds by the city of Jacksonville, and was brought in the circuit court of the United States for the northern district

of Florida. Colvin alleged that he was a tax payer, and that the amount of taxes that would be assessed upon the property owned by him in the city would exceed $2,000. *This was denied, and the complaint then contended that not the amount of his taxes, but the amount of the bonds proposed to be issued ($1,000,000) was the amount in controversy.* The Circuit court dismissed the case for want of jurisdiction, and this court sustained the ruling, saying by the Chief Justice that '*the amount of the interest of complainant, and not the entire issue of bonds,* was the amount in controversy, and, in respect of that, we have no doubt, the ruling of the circuit court was correct.' El Paso Water Co. v. El Paso, 152 U. S. 157, 38 L. ed. 396, 14 Sup Ct. Rep. 494, was cited and approved."

Stating the rule as being absolute that *the amount of the interest of complainant* and *not the entire issue of bonds* was the amount in controversy.

Turner v. Jackson Lumber Co. 159 Fed. 923 is directly in point, citing and following many of the leading cases.

Douglas v. Stone, 110 Fed. 812, holds:

"A suit to enjoin the enforcement of a tax levied on lands under authority of a state by the sale of timber from such lands, where it is not alleged that the tax is illegal, but merely that it was erroneously levied, is not a suit to remove a cloud on title, and the amount involved for the purpose of determining the jurisdiction of a federal court is the amount of the tax, and not the value of the land."

This case was affirmed without the court writing an opinion citing and following the Holt and Fishback cases, supra, in 191 U. S. 557 L. ed. Book 48, p. 557, and this, nothwithstanding the fact that it was there contended that the right involved was of great importance.

In Shewalter v. City of Lexington, 143 Fed. 161, a very able opinion is rendered by Judge Phillips citing many of the leading cases supporting the rule in question.

CASES RELIED UPON BY COMPLAINANT BEFORE THE CIRCUIT COURT.

Upon the argument and in the briefs in the Circuit Court, the complainant claimed that:

> "The main purpose of the bill was to prevent the carrying out of the contract for the construction of the system and to prevent the issuance and delivery of the $600,000 of bonds."

In support of such contention complainant relied principally upon the following three cases:

Brown v. Truesdale, 138 U. S. 389.

Colvin v. City of Jacksonville, 156 U. S. 455.

City of Ottumwa v. Water Supply Co., 119 Fed. 315.

THE BROWN CASE.

The U. S. Supreme Court in a later case, namely:

Colvin v. City of Jacksonville, 158 U. S. 455, 460, distinguished the Brown case in the following language:

> "Brown v. Trousdale, 138 U. S. 389, 394 (34: 987, 989), is not to the contrary. *There several hundred taxpayers of a county in Kentucky, for themselves and others* associated with them, numbering about twelve hundred, and for and on behalf of all other taxpayers in the county, 'and for the benefit likewise of said county', filed their bill of complaint against the county authorities and certain funding officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection; and an injunction was also asked as incidental to the principal relief against the collection of a particular tax levied to meet the interest on the bonds." (The italics are ours.)

So in the case at bar, both the *original* complaint, (Tr. 2) and the *amended* bill of complaint (Tr. 57) is only by complainant *in its own behalf* and *not on behalf of other taxpayers* similarly situated. And furthermore in said Colvin case (p. 458-459):

> "It was contended by the complainant that the property of said complainant would be liable to taxation on account of the issue of said bonds to an amount exceeding $2000, and it was further contended by complainant as a proposition of law that

the amount of taxes that the complainant would have to pay was not the amount in controversy, but that the total amount of issue of bonds, one million of dollars, was the amount in controversy which would determine the jurisdiction of this court, and upon said hearing as aforesaid the court found as a matter of fact that the amount of taxes which the complainant would be obliged to pay as interest and sinking fund on account of the said proposed issue of bonds would not exceed two thousand dollars, and as a matter of law that *the interest which the complainant* had in the issue of bonds and *not the amount of the entire issue* thereof was the *amount in controversy* and found therefore that this court had no jurisdiction of such controversy, and therefore dismissed said complainant's bill."

OTTUMWA CASE.

This case is clearly distinguishable, upon the concrete facts therein presented and legal principles therein involved, from the suit at bar, on a number of grounds, viz:

The City of Ottumwa had *absolutely no power*, either under the constitution or the statutes of Iowa, *to extend its debt limit.*

1. In this case, the City of Helena, *unquestionably has the power*, under our constitution and statutes, to extend it.

There is a vast difference between the entire absence or want of power as there was in the Ottumwa

case; and the existence of a power expressly conferred, as in the case at bar.

2. Notwithstanding that the city of Ottumwa had so exceeded its debt limit and *had absolutely no power* under the constitution and statutes to *extend such limit,* it undertook by an *indivisible ordinance* to enter into a four hundred thousand dollar contract; to issue its bonds for said amount; to mortgage the water plant which it proposed to purchase, and to obligate itself to levy, and its tax payers to pay, a *two mill tax for fifty years, and also a five mill tax for a like period.*

In this case the city has done nothing of the kind in that:

(a) *It has the power* under the constitution and statutes to extend its debt limit;

Section 6 of Article XIII of the Constitution provides:

> "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void: Provided, however, *That the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to sub-*

mit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality, which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

Section 3259 of the Revised Codes, Subdivision 64, provides:

"The City or Town Council has power:

"64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to wit: Erection of public buildings, construction of sewers, bridges, water-works, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; Provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for State and County taxes; Provided, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof;

and, further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for state and county taxes; and, provided further, that the above limit of three per centum shall not be extended, unless the question shall have been submitted to a vote of the tax-payers affected thereby and carried in the affirmative by a vote of the majority of said tax-payers who vote at such election. * * ***

Section 3454 of Revised Codes of Montana provides:

"Whenever the council of any city or town, having a corporate existence in this State, or hereafter organized under the provisions of this Title, shall deem it necessary to borrow money or contract indebtedness under its powers, as set forth in subdivision 64 of Section 3259 (4800) of the Political Code, or amendments thereto, the question of issuing bonds or contracting such indebtedness shall first be submitted to the qualified electors of such city or town in the manner hereinafter set forth: Provided, the taxpayers only, as defined by Sections

468 (1187) and 469 (1188), of the Political Code, shall be entitled to vote on questions concerning the construction, purchase or securing of a water plant, water system, water supply, or sewerage system. [Act approved March 6th, 1897, § 1.] (5th Sess. 226.)"

Sections 3455-3464, Rev. Codes, provide for the method of holding the election, and issuing and selling the bonds.

See also:

City of Helena v. Helena Water Works Co., 122 Fed. 1.

Helena Water Works Co. v. City of Helena, 195 U. S. 383; 49 L. ed. 245.

(b) It has extended its debt limit, and it has the power to issue water bonds under the statutes.

(c) There is no ordinance in this suit obligating the city to levy, or its tax payers to pay, *a tax of two mills for fifty years and a tax of five mills for a like period.*

The most that can be said is, that, pursuant to the mandatory provisions of Section 6 of House Bill 206 (Section 3459 of the Revised Codes) the city has levied a special tax of one mill on complainant's property for the year 1908. How much it will levy in the future, if any, must of necessity, depend entirely upon conjecture and speculation. As to this, however, under the constitution of the state and the statutes, the revenues derived

from the plant about to be constructed, must be devoted to the payment of the debt incurred therefor. It may therefore be, that the city will never be required to levy any further tax to pay the bonds or any interest thereon.

We desire to call the court's attention to the language of the opinion in this case. The court says:

> "The amount in dispute in this suit, if only measured by the injury to the complainant from the increased taxation of its property in the city of Ottumwa necessary to provide for the payment of bonds proposed to be issued for the construction of the new waterworks, was more than sufficient to sustain the jurisdiction of the circuit court. Whether we consider the proportion of the $398,991—the cost of the proposed waterworks—which would rest on the complainant's property as part of the taxable property of the city, or the two-mill tax thereon during the period of 50 years provided for, the burden or incumbrance which would be made to rest on the property of complainant would considerably exceed the sum of $2,000."

No reference is made in this opinion to the Colvin case, or the El Paso case. And the language of the court, accumulating the interest for the different years, is directly and distinctly against the decision in the above mentioned cases. We therefore must conclude that the court in the Ottumwa case, in the use of the above language, did not state the law as laid down by the Supreme Court of the United States.

The court in the Ottumwa case then uses the following language:

> "But the city of Ottumwa was about to enter into the proposed contract for the erection of waterworks, and issue and negotiate bonds of the city as proposed to the amount of $398.900 to procure money to pay for the same. Complainant contends that the city, being already indebted beyond the constitutional limit, has no right or power to enter into such contract or issue such bonds. *Whether it has or has not such power to issue and negotiate that large amount of bonds is certainly the matter in dispute in this suit, brought to restrain and prohibit the city from taking such action.*

It therefore appears that in the last quotation from that opinion the court bases the jurisdiction upon the proposition that the city was undertaking to issue bonds and enter into contracts *without any power*, under the constitution or statutes so to do. This clearly shows the difference between that case and the one at bar. Here the *City of Helena is not undertaking to issue bonds or carry out a contract without any power. The constitution and the statutes give the City of Helena the power.*

The following cases were also cited and quoted from by complainant in the Circuit Court, viz:

Beadles v. Smyser, 209 U. S. 393.

Board of Trustees v. Berryman, 156 Fed. 112.

Bitterman v. Louisville & N. R. Co., 207 U. S. 205.

Johnson v. City of Pittsburg, 106 Fed. 753.

Texas & P. R. Co. v. Kuteman, 54 Fed. 547.

Nashville R. Co. v. McConnell, 82 Fed. 65.

Humes v. Fort Smith, 93 Fed. 857, 862.

Delaware L. & W. R. R. Co. v. Frank, 110 Fed. 689, 694.

Hunt v. New York Cotton Exchange, 205 U. S. 322, 336.

We will now consider said cases *ad seriatim:*

The case of Beadles vs. Smyser, 289 U. S. 393, is not applicable. The question there involved is stated by the Supreme Court at page 400 as follows:

> "The question made in the case is, Are the judgments dormant by the statute of limitations of the territory of Oklahoma for failure to issue execution thereon for the period of five years, and because the same were not revived within one year after they became dormant?"

The case of Board of Trustees vs. Berryman, 156 Fed. 115 is readily distinguishable. That was a suit *to permanently exempt* the Whitman Seminary *from taxation.* The italicized language constituted the pivotal features and was so held by Judge Whitson following the United States Supreme Court in Citizens' Bank vs.

Cannon, 164 U. S. 319 (upon which we also relied and have quoted above), and in which last mentioned case the Supreme Court held: "*but this is not a suit to exempt the property from taxation permanently.*"

The case of Bitterman v. Louisville & N. R. Co., was quoted. The Supreme Court opinion speaks for itself as to the jurisdictional features in the following language, (p. 224, 225):

> "The bill contained an express averment that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of $5,000 as to each defendant. The defendants not having formally pleaded to the jurisdiction, it was not incumbent upon the complainant to offer proof in support of the averment. Nevertheless, the complainant introduced testimony tending to show that, on the New Orleans division of its road, *a loss of from fifteen to eighteen thousand dollars a year was sustained* through the practice by dealers of wrongfully purchasing and selling nontransferable tickets. That hundreds of the tickets annually issued for the Mardi Grass festivals in New Orleans were wrongfully bought and sold; that other nontransferable reduced-rate tickets were, in a like manner, illegally trafficked in to the great damage of the corporation, and that the defendants were the persons principally engaged in conducting such wrongful dealings. But, even if this proof be put out of view, we think the contention that a consideration of the whole bill establishes that the jurisdictional amount alleged was merely colorable and fictitious is without merit. We say this because

> *the averments of the bill as to the number of such tickets issued, the recurring occasions for their issue, the magnitude of the wrongful dealings in the nontransferable tickets by the defendants, the cost and the risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complaint, the operation of the illegal dealing in such tickets upon the right of the complainant to issue them in the future,* coupled with the admissions of the answer, sustain the express averment as to the requisite jurisdictional amount."

Counsel quoted the excerpt immediately following the above quotation commencing with the word "besides" in said opinion, but the concrete facts upon which jurisdiction was sustained were affirmatively shown by the complaint and the proof adduced in support thereof.

Johnson v. City of Pittsburg, 106 Fed. 753 was a suit to obtain the cancellation and surrender of a contract entered into by the city with an asphalt company in which *both the city and the company were originally made defendants.* The only object of the suit was the cancellation of the contract; as stated by the court:

> "The bill does not seek to enjoin the levy of a proposed tax, or restrain collection of one levied. True, it is averred complainant is a property owner and taxpayer, but this is evidently done to show he is not an intermeddler, and on the theory that such facts give him standing to file a bill to question the legality of the contract."

The opinion does not state sufficient facts to show upon just what ground the contract was attacked, whether for the entire absence of the city's power to make such contract as in the Ottumwa case, or upon what ground. It is noteworthy, however, that this case has nowhere been cited in the Shepard's citations to the Federal Reporter except in the Ottumwa case. Neither the Ottumwa case nor the Johnson case were ever before the Supreme Court of the United States; and in view of the decisions of the Supreme Court in the Colvin and El Paso cases, we opine that it would not be difficult to forecast the result, if they had ever been reviewed by the Supreme Court.

The case of Texas & P. Ry Co. v. Kuteman, 54 Fed. 547 was to restrain defendant from prosecuting certain suits in a state court. The jurisdictional amount affirmatively appeared on the face of the bill. To quote the language at page 552:

> "In the letter of the defendant attached to complainant's pleadings and made a part of its bill, he claims an overcharge on one car of $24. Taking that as an average, and deducting the $488.15 already sued for in the state courts, would give the amount of $2,031.85. But the complainant also avers that the rates established and charged by it are not one half so much as the maximum rate it is authorized by law to charge; that it is reasonable, fair, and just, and that complainant's right to establish and maintain such rate is a valuable one, and of the value of more than $10,000."

In Nashville Ry. Co. v. McConnell, 82 Fed. 65, jurisdiction was based upon the avoidance of a multiplicity of suits, and irreparable injury which would occur to complainant by "scalpers" selling railroad tickets; hence the language of the court (on page 74, quoted by counsel in the circuit court brief): "The loss likely to result in the future enters into the value of the suit for preventitive relief."

Nor is the case of Humes v. Fort Smith, 93 Fed. 857, applicable. As stated in the opinion, at page 862: "The object and purpose of the bill is to *declare void the ordinance of the defendant city, and thereby prevent the destruction of*, or at least great injury to, *this business.*" In the bill of complaint, page 858, it was alleged "that the object of fixing the license so high was to destroy his (complainant's) business, and that, if the ordinance is enforced, that result will follow."

Delaware L. & W. R. Co. v. Frank, 110 Fed. 689, was also a "scalpers' ticket" case; jurisdiction was retained on the grounds of avoiding multiplicity of suits, and irreparable injury to complainant,—the same as in the Nashville Ry. Co. case, supra.

The case of Hunt v. New York Cotton Exchange, 205 U. S. 322, at 336, was also quoted by counsel. But in that suit, in the language of the Supreme Court:

> "The object of the suit is to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity

of its business with that of bucket shops. * * * The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the exchange determines the jurisdiction, not the rate paid by the appellant to the telegraph company. *The value of the right was testified to be much greater than two thousand dollars.*"

Since this case was argued, the decision of this court in the case of Northern Pacific Railway Company v. Pacific Coast Lumber Manufacturing Association, has been reported in the advance sheets of January 21, 1909, 165 Fed. 1.

Complainants counsel will probably contend that the closing page of said decision supports their contention; but without gainsaying for a moment the entire correctness of that decision and its applicability to the facts therein involved, we respectfully submit that the principle with reference to such facts is not the *one* which governs in a *taxpayer's suit* to restrain a municipality. Let us assume, however, for the sake of argument only, that it is applicable, yet the complainant has failed to show the jurisdictional amount.

In other words, let us assume that "the real issue in this case is not the amount of tax which complainant may have to pay if the bonds are issued, but the right of complainant to prevent their issue."

Can the complainant be heard to say that its right

to prevent the issuance of the bonds in controversy is any higher or any greater than the loss which it is legally bound to suffer, in case said bonds are issued?

Or, stated in another way, *can the assertion of the right to do a thing be of greater value that the result of the exercise of such right, and contra, can the right to prevent the exercise of a claimed right be of greater value than the loss suffered by the exercise of such claimed right?* If the bonds are issued and sold and legal debt is thereby imposed on the city, what is the measure of the complainant's loss, if any?

It is the taxes which the complainant will thereby be legally compelled to pay, no more and no less. What taxes will the complainant be compelled to pay? The answer to this question confers or denies the jurisdiction.

If a tax has been levied and a legal liability thereby created the measure of that liability is the amount of the taxes. If the city sought to enforce the liability by legal proceedings, the amount of its recovery would be the amount of the taxes, and likewise if the complainant sought to be relieved of such liability the measure of the complainant's right would be the same as the amount of the city's right, that is, the amount of the recovery, or the amount that was sought to be relieved of. Future taxes which may or may not be levied, depending upon conditions which may or may not hereafter occur and dependent likewise on the judg-

ment and discretion of the officers on whom the city has imposed the decision of the necessity of such taxes, none of which appear now; nor is any fact existing by which they can by any possibe means ascertain, which can be taken into account in determining the present legal rights of both parties. No tax is even threatened to be levied by the city in the future.

No averment is made in the petition of any amount of taxes which the city claims the right to levy, or any threats that it intended to levy. Nor is it averred in the petition that the city has any knowledge at this time by which the city could assertain or determine what, if any tax, may become necessary to levy and collect in the future. How then can it be fairly said from the facts on the face of the pleadings, or by any method of valuation, that complainants right is of the value of $2,000?

The only allegations of the amended complaint on the question of the jurisdictional amount involved are those contained in paragraphs 3 and 40½ of the amended bill. Both of these allegations are denied in the original answer and in the amendments to the answer; and the amount actually involved is only the sum of $398.50, the amount of taxes already levied and assessed against complainant.

Counsel asserted in their brief that "if all reference to the levy should be eliminated from the bill and the prayer should merely ask for an injunction to prevent

the carrying out of the contract and delivery of said bonds, a cause of action would be stated." They did not, however, offer to eliminate such allegations and stood on the complaint in that condition. Such complaint might state a cause of action in the state court, but not in the Federal Court because of the failure to show that the amount in controversy exceeds the sum of $2000.

Counsel for the complainant also claimed that the purpose of the bill is to prevent the carrying out of the contract for the construction of the water system.

AS TO THE CONTRACT.

The contract is subservient to the bonds and its cancellation is necessarily a mere incident to enjoining the issuance and delivery of the bonds. It cannot under any circumstances take effect until the bonds are sold, as expressly provided for in the contract as follows:

> "It is hereby mutually understood and agreed between the parties hereto that whereas the said City must provide the funds for making all payments hereunder from the sale of bonds issued or to be issued by said City, and whereas said bonds have not yet been sold, said contractor shall not be required to perform any of the conditions of this agreement until said bonds shall have been sold by said City, and that within five days after the sale of said bonds by said City, the said City shall cause

written notice of such sale to be served upon the contractor who shall forthwith keep and perform all of the terms and conditions hereof. In case said City shall fail to sell said bonds on or before July 1st, 1909, then this contract shall become null and void."

If, therefore, the bonds are not valid it follows of necessity that thereby ipso facto the contract falls. Such being the case, the one and in fact only issue which is left would be the validity of the bonds. Assuming that the amount of taxes is only an "incidental issue" as claimed by complainant, this then would bring the case squarely on all fours within the decision in the cases of:

El Paso Water Co. v. El Paso, 152 U. S. 157.
and Colvin v. City of Jacksonville, 158 U. S. 456.

The contract on its face did not take effect until the bonds were issued and sold. The city possessed no debt making power, except the power to issue these bonds in accordance with the vote of the tax payers, and the city did not assert the right, or attempt to assert the power to make any debt or impose any liability on the city except the issue and sale of the bonds in accordance with the vote of the tax payers.

It possessed the legal power if the bonds were sold, to use the proceeds in building a water system, and that is all the city did or attempted to do. The contract with the American Light and Water Company created no

liability except to use the proceeds of the bonds in case they were sold, for the purposes of which they were voted, namely to build a water works system. Therefore the complainant's claim that the real issue in this case in attacking the contract the city made with the American Light and Water Company is a feigned issue, only presented, presumably for jurisdictional purposes, and presumably as a basis for the contention that the real purpose of the suit is to attack the right of the city to proceed independent of the interest of the complainant as a tax payer.

If the bonds were valid and issued, and the contract carried out, the *revenues derived from the plant must be devoted to the payment of the debt.* Under the statute, such tax as is levied can only be levied *each year;* and then the amount is left to the discretion of the council. *Under the statutes, the city had not and has not the power by ordinance or otherwise to assume to levy for future years the amount of the tax;* nor could it predetermine the amount to be raised by taxation, in view of the plain mandatory provisions of the Constitution and statute, requiring that the revenue derived from the plant must be devoted to the payment of the debt; which last mentioned provision clearly evinces the legislative intent and that the legislature had this condition of affairs in mind.

How then, could any court assume to calculate the amount of the tax in future years? To ask this ques-

tion is in itself an ample reply to the impossibility of ascertaining by any calculation the amount of taxes, if any, which the complainant would be required to pay in the future. These, however, are questions which need not be predetermined, because the record affords no means for their ascertainment. But complainant asks this Honorable Court, *ex necessitate*, to predetermine this in its attempt to confer jurisdiction; and not only asks this court to fix such amount, but to *presume* in advance that the amount of future tax levies would be such as to equal or exceed the jurisdictional amount of $2000. In no other way, in the endeavor to confer jurisdiction can it be said upon the amended bill and answer, that the jurisdictional amount is shown. Viewed from any aspect of valuation and which is the criterion by which the Federal Court ascertains whether or not it has jurisdiction, the necessary amount is not shown, and as a matter of fact *cannot be shown, because it does not exist.*

There is no allegation in the amended complaint of any injury to the complainant in the letting of the contract, or that any such injury will arise if the contract is fully performed and carried out.

Nor is there any claim in the amended bill that the contract was beyond the power of the city to make, or that it was unfair or not for the best interests of the city, or that it was fraudulent or for an excessive price. The only allegations in the amended complaint in regard

to the contract are in paragraphs 19 to 25, inclusive. And as to the effect of these allegations, Judge Hunt held:

"It was an irregularity on the part of the city to enter into a contract with the American Light and Water Company without requiring of that company a bond with at least two sureties conditioned for the faithful performance of the contract, as manifestly contemplated by the ordinance of the city and the laws of the state, prescribing that foreign surety companies should comply with the provisions of the statutes of the state before doing business therein and that, unless they do, all bonds and undertakings entered into by any citizen or resident of the state with any such organization as surety shall be void. *But I am not prepared to say that were this the basis for complainant's bill, it would justify injunction.*"

Furthermore, the form of the contract had been adopted by the city council on September 24th 1908, containing the above significant clause. At the same meeting the bond ordinance had been passed, authorizing the issuance of the sale of bonds and fixing the date for the sale of the bonds on November 16, 1908. Notwithstanding these facts, complainant did not file its bill of complaint until October 28, two days before the day for awarding the contract; and when it did file its bill of complaint *it made no attempt to procure a preliminary injunction against entering into the con-*

tract; but contented itself in awaiting developments with reference to the bond sale. Not until *November 12th,* 1908, for reasons best known to itself, but probably because it learned that there was a very strong likelihood of the bonds being sold, did it then apply for a preliminary injunction. Why?

Because complainant well knew in the face of said clause, that the entering into the contract would be merely a form, and an idle ceremony, unless the bonds were successfully sold. This discloses, therefore, that the injunction was aimed, not at the contract or to prevent the city from entering into a contract with any one, but to prevent the sale of the bonds or the delivery of the bonds in case of their sale,—well knowing that even though the contract had been entered into, it could not "be carried out" without the sale of the bonds.

And, even though on October 30th, 1908, the city had awarded the contract to the American Light & Water Company, it did not make said company a party to the case, nor make any application so to do, and not until the company itself through its attorneys obtained the consent of complainant and the city by stipulation that it, the company, should be made a party to the action, was it made a party. *Again, when the court ordered an injunction to issue on February 11th, complainant's counsel did not include the company in the injunction; and there is now no injunction against said company.*

Thus it was immaterial from the complainant's standpoint about the company entering into the contract, or *depriving the defendant company of the amount of its contract.* It is, of course, axiomatic that consent cannot confer jurisdiction of the subject matter. It follows, therefore, of necessity that the making of the American Light & Water Company a party defendant by consent could not aid the complainant when the question of jurisdiction arose.

SCOPE OF THE INJUNCTION.

In the written opinion of the learned District Judge, copies of which are herewith filed, it will be seen that the following points were decided:

1. Invalidity of the bond *sale*, because of the bid being conditional.

2. Invalidity of the bonds, because of interest being payable April 1, and Sept. 1, instead of July 1, and January 1, as required by statute.

3. Though it was an irregularity for the city to enter into the contract in not requiring a bond with two sufficient sureties, as contemplated by the ordinance and the laws of the state, prescribing that foreign surety companies should comply with the provisions of the statute, before doing business therein, yet, if such irregularity was the basis for complainant's bill, it would not justify an injunction.

That which was intended to be enjoined, as we view it, was the issuing and delivery of the bonds authorized by the bond ordinance (No. 742) passed September 24, 1908.

Under the taxpayers' election held in April, 1908, the authority to incur the additional indebtedness had been expressly conferred. The original bill of complaint (before the bond sale) attacked said election proceedings, and at that stage the court refused the injunction.

Had the court intended by its decision to hold that the election proceedings were invalid, it would have so decided; and then, but not until then would an injunction as broad in its scope have been warranted, in view of the written opinion.

What was held was that the *particular bonds*, and the attempted issuance and *delivery thereof*, were invalid; not that the city had not been authorized under the taxpayers' election to issue new bonds.

Complainant's counsel were directed in the written opinion to prepare an order, and we cannot but believe that signing of the same, including the portion referred to, was done inadvertently.

That the city construed the order in the light of the opinion is shown by the fact that on March 1, it repealed the old bond ordinance, passed a new one, and commenced anew its proceedings. This would have

been a flagrant violation of the order, apparent to anyone,—if the situation had not been as above stated.

Taken literally and by itself, without reference to the opinion, the particular portion: "from making *any* contract or incurring *any indebtedness* for a water system or supply" would, of course, prevent any *new* bonds and would mean the nullification of the election proceedings.

Assuming, therefore, that the court had jurisdiction, the following portion of the injunction: "and from making any contract or incurring any indebtedness for a water system or supply," should be eliminated.

We do not, however, wish to be understood as receding from our position and contentions as to jurisdiction, and submit that the suit should be dismissed.

Respectfully,

EDWARD HORSKY,
City Attorney for Appellant.

C. A. LOOMIS,
Of Counsel.

1703

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE CITY OF HELENA,

Appellant,

vs.

HELENA WATER WORKS COMPANY,

Appellee.

BRIEF FOR APPELLEE.

FILED
MAY 17 1903

MILTON S. GUNN, and
CARL RASCH,

Solicitors for Complainant.

Naegele Printing Co., Helena, Mont.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE CITY OF HELENA,

Appellant,

vs.

HELENA WATER WORKS COMPANY,

Appellee.

BRIEF FOR APPELLEE.

The appellant questions the jurisdiction of the circuit court by contending that the amount in dispute does not exceed $2,000.00 exclusive of interest and costs. It is also contended in behalf of the appellant that the injunction granted should be modified by eliminating the words "and from making any contract or incurring any indebtedness for a water system or supply."

The appellant concedes that if the circuit court had jurisdiction the injunction was properly granted except to the extent that it is claimed the same should be modified.

I.

JURISDICTION.

In considering this objection the allegations of the bill as amended must be taken as true as no plea to the jurisdiction was filed.

The bill of complainant as amended alleges:

"3. That the matter in dispute in this suit exceeds in value the sum of $2,000.00, exclusive of interest and costs.

"4. That your orator is the owner and in possession of real and personal property situate in the city of Helena of the value of several hundred thousand dollars, upon which taxes have been levied, assessed and collected by said city. (Record p. 58.)

"27. That the assessed value of all of the taxable property of the said city of Helena for state and county taxes for the year 1907 was the sum of $10,799,000, and the assessed value of said property as determined by the assessment roll for state and county taxes for the year 1908 is the sum of $11,629,834. (Record p. 68.)

"40-½. That if said bonds are issued and become obligations of said city the taxes on the property of your orator within said city to pay the interest on said bonds and provide a sinking fund for the redemption thereof will exceed the sum of ten thousand dollars." (Record p. 76.)

It also appears from the bill as amended that the city made a levy of taxes for municipal and adminis-

trative purposes for the year 1908 of 11-¾ mills. One mill of this amount was "for the payment of interest upon the water bonds." (See paragraph 26 of Bill, Record p. 67.)

In each of the bonds proposed to be issued by the city it is provided that "the full faith and credit of said city are hereby pledged for the punctual payment of the principal and interest of this bond," and it is recited "that provision has also been made for the levy and collection of an annual tax for the purpose of paying interest on this bond and to create a sinking fund for its redemption." (Record pp. 104-106.)

Paragraph 40 of the bill reads as follows:

> "That unless restrained by an order and injunction of this court the said city will proceed to sell said bonds in the manner and form aforesaid, and will issue and deliver the same, making them negotiable in the hands of innocent purchasers, and pledging the credit of the city for the payment thereof; and the city council of said city will each year levy and collect a tax upon all the taxable property of said city, including the property of your orator, to pay said interest on said bonds and to provide a sinking fund for the payment of the principal, and the said city will cause the said water system to be constructed before acquiring the right to use the water of McClellan creek to supply said city, all contrary to law, and to the great and manifest wrong and injustice of your orator and other taxpayers of the said city, and your orator and

other taxpayers will be without remedy.". (Record p. 76.)

The prayer for relief is as follows:

"That Your Honors grant unto your orator your writ of injunction commanding the said defendant, and each and all of its officers, agents, servants and employees, to absolutely desist and refrain from entering into said contract for the furnishing of material and the construction of a water works, system, reservoir, pipe line and distributing system, and from selling, issuing or delivering said bonds, or any thereof, and from making any contract, or performing or carrying out said contract, a copy of which is made a part hereof as Exhibit E, or incurring any indebtedness for a water system or supply, or collecting any tax for the payment of the interest or principal of said bonds, until such time as Your Honors shall direct and appoint a hearing herein.

"That said defendant, its officers, agents, servants and employees, and each of them, be restrained from the commission of any of the acts or doings herein sought to be enjoined, and that upon such hearing the writ herein prayed for pending this suit be made and confirmed until the final determination of this suit, and that thereupon said injunction be made perpetual." (Record p. 77).

In the answer the assessed valuation of the taxable property of the city is admitted to be stated in the bill, and it is further admitted that the complainant is

the owner and in possession of taxable property situate within the city of the value of $398,500. The allegations of paragraph 40-½ of the bill are denied, but this denial is unimportant in view of the admissions referred to.

In support of the objection it is contended that the measure of the amount in controversy in this suit is the tax of one mill levied upon the property of the complainant, as alleged in the bill of complaint.

Numerous authorities are cited by counsel for defendants which they contend sustain the objection to the jurisdiction so made. An examination of these cases will show that in every case in which jurisdiction is denied *the main purpose of the bill was for an injunction to prevent the collection of a tax.* These cases have no application to the case before the court, for the reason that the *main purpose of the bill is to prevent the carrying out of the contract for the construction of the system and to prevent the issuance and delivery of the $600,000 of bonds.* The injunction to prevent the collection of the tax of one mill already levied is merely incidental to the main relief sought. This necessarily follows from the fact that if all reference to the levy of the tax should be eliminated from the bill, and the prayer should merely ask for an injunction to prevent the carrying out of said contract and the issuance and delivery of said bonds, a cause of action would be stated.

The case of the City of Ottumwa v. Water Supply

Co., 119 Fed. 315, decided by the circuit court of appeals for the eighth circuit, completely disposes of the objection to the jurisdiction of the court here made. In the case referred to it appeared that the City of Ottumwa had entered into a contract for the construction of water works and was about to issue bonds for the purpose of procuring money with which to pay the contract price for such water works. The City Water Supply Company, a corporation of the state of Maine, filed its bill of complaint, alleging that it was the owner of a large amount of real estate and personal property in the city, on which there had been expended more than $500,000, was a large taxpayer of said city, and that the annual tax charge against its property exceeded $2,000. The court in the opinion said:

> "The amount in dispute in this suit, if only measured by the injury to the complainant from the increased taxation of its property in the city of Ottumwa necessary to provide for the payment of bonds proposed to be issued for the construction of the new waterworks, was more than sufficient to sustain the jurisdiction of the circuit court. Whether we consider the proposition of the $398,991 —the cost of the proposed waterworks— which would rest on the complainant's property as part of the taxable property of the city, or the two-mill tax thereon during the period of 50 years provided for, the burden or incumbrance which would be made to rest on the property of complainant would considerably exceed the sum of $2,000.

"But the city of Ottumwa was about to enter into the proposed contract for the erection of waterworks, and issue and negotiate bonds of the city as proposed to the amount of $398,900 to procure money to pay for the same. Complainant contends that the city, being already indebted beyond the constitutional limit, has no right or power to enter into such contract or issue such bonds. Whether it has or has not such power to issue and negotiate that large amount of bonds is certainly the matter in dispute in this suit, brought to restrain and prohibit the city from taking such action. Johnston v. City of Pittsburg, 106 Fed. 753; Rainy v. Herbert, 55 Fed. 443; Market Co. v. Hoffman, 101 U. S. 112; Railroad Co. v. Ward, 2 Black, 485; Stinson v. Dousman, 20 How. 461; Scott v. Donald, 165 U. S. 107."

Attention is also called to the opinion of the circuit court on granting the first preliminary injunction in the case in 119 Fed. 325. District Judge McPherson in the opinion referred to said:

"And I believe, and so hold, that, both because of the amount of the debt that complainant will be required to pay and because of the amount of the alleged illegal debt, the court has jurisdiction."

By the contract involved in the case of the City of Ottumwa v. Water Supply Co. it was provided that the construction of such waterworks should be commenced "within sixty days after the ratification and approval of the contract by the electors of said city at a special

election to be called, or as soon thereafter as the city should succeed in negotiating and selling its bonds for the purpose of creating a trust fund." (See statement of facts, p. 317.) The contract involved in the case at bar provides:

> "In case said city shall fail to sell said bonds on or before July 1, 1909, then this contract shall become null and void." (Amended Bill, p. 35.)

The circuit court of appeals in the opinion in the City of Ottumwa case cites, among other authorities, Johnson v. City of Pittsburg, 106 Fed. 753. The court in the opinion in that case said:

> "This is a bill in equity brought by James C. Johnston, a citizen of South Carolina, and a property owner and taxpayer of Pittsburg, against the said city, several of its officials, and the Pennsylvania Asphalt Company, a corporation of the state of New Jersey. The allegation of the bill is that a contract for grading and paving several streets of said city was unjustly and illegally awarded said asphalt company. The relief sought against the city is that it be enjoined from entering into a contract with the asphalt company pursuant to such letting, from executing and delivering such contract, and from paying any money thereunder. The relief sought against the asphalt company is that any contract made with it by the city be surrendered for cancellation. The bill avers the matter in controversy exceeds $2,000. To this bill the respondents unite in a plea in which they allege that the total liability of the city under the contract is less than

$300,000; that the total valuation of the city for taxation is $270,000,000, and that the value of the complainant's property is about $3,500; that the taxes that can be levied on complainant's property by reason of the performance of said contract can not amount to $2,000. The plea alleges that the amount in controversy is less than $2,000, and therefore the federal court has no jurisdiction. It will thus be noted the only question now before us is one of jurisdiction,—whether the requisite jurisdictional amount is involved. After careful consideration, we are of opinion this plea must be overruled. The bill does not seek to enjoin the levy of a proposed tax, or restrain collection of one levied. True, it is averred complainant is a property owner and taxpayer; but this is evidently done to show he is not an intermeddler, and on the theory that such facts give him standing to file a bill to question the legality of the contract. If the prayers of the bill were granted on final hearing, the asphalt company would be deprived of a contract far in excess of the required jurisdictional sum. If this asphalt company was respondent in a bill filed in a state court, the prayer of which was to strike down such a contract, manifestly its right of removal to a federal court, if otherwise proper, could not be denied by reason of the allegation that the matter in controversy was the amount of taxes the complainant would have to pay if the contract were performed."

In this connection the fact that the American Light & Water Company is now a defendant (Record pp. 128-130) should not be overlooked. What is the value to the American Light & Water Company of the con-

tract for the construction of the water works and of the contract for the purchase of the bonds? Does the amount in controversy between the complainant and the American Light & Water Company exceed the sum of $2,000, exclusive of interest and costs? It would seem to us that these questions do not require answers.

In the brief for appellant an effort is made to distinguish the City of Ottumwa case. It is said that the City of Ottumwa was without power to extend its debt limit, whereas the City of Helena has the power to incur the indebtedness in question by virtue of section 6 of article 13 of the constitution of Montana and certain provisions of the Revised Codes of this state to which reference is made.

Whether or not the City of Helena has the power or authority to incur an indebtedness by issuing the bonds proposed to be issued is the very question in dispute. In the application of the principles determining the amount in controversy, which were applied in the City of Ottumwa case, it is absolutely immaterial whether there is an entire absence of power to incur the indebtedness or a failure to observe the requirements necessary to take advantage of the power where it exists. In either event there is a want of power to issue bonds. Furthermore, the assumption that the City of Helena has the power to extend the debt limit of said city or incur the indebtedness in question is wholly unwarranted in view of the constitutional provision, the

provisions of the Revised Codes referred to and the allegations of the bill of complaint as amended.

This court in the case of Northern Pacific Railway Company vs. Pacific Coast Lumber Mfrs. Ass'n., 165 Fed. 1, cities the City of Ottumwa case approvingly. The rule applied by this court to determine the amount in controversy in the Northern Pacific Railway case, 165 Fed. 1, when applied to the case now before the court establishes beyond question the proposition that the amount in controversy is not measured by the tax already levied which complainant will be required to pay.

District Judge Hunt, in his opinion in this case, and which will be found at the conclusion of this brief, said, with reference to the objection to the jurisdiction:

> "The learned counsel for the defendants have questioned the jurisdiction of this court, contending that, although a purpose of the bill is to prevent the issuance and delivery of the $600,000.00 of bonds, yet the amount in controversy is simply the tax levied against the property of the complainant for the year 1908, which only amounts to $398.50. Complainant, on the other hand, argues that this court has jurisdiction, in that the main purpose of its bill is to prevent the carrying out of the contract for the construction of the water system, and to prevent the issuance and delivery of the $600,000.00 of bonds, and that prevention of the collection of the tax already levied is merely incidental to the main relief sought. A careful reading of the bill

convinces me that the position of the complainant is correct. What it really seeks to do is to prevent the city of Helena from entering into the proposed contract for the erection of water works, and the issuance and delivery of $600,000.00 of the bonds of the city to procure money to pay for the proposed new water system. There is, accordingly, involved the very important question whether the city has the right and power to enter into such proposed contract, and to issue such proposed bonds. The case thus presents an instance of a taxpayer questioning the validity of a proposed issue of bonds of $600,000.00, and of a contract involving over $200,000.00, and also of the levy and collection of taxes for years to come to pay interest and principal on the bonds. Under such a state of facts, a taxpayer, whose taxes during the period of years provided for in the bonds, would exceed the sum of two thousand dollars, has a right to invoke the jurisdiction of the circuit court of the United States, provided always, diversity of citizenship exists.

City of Ottumwa v. Water Supply Co., 119 Fed. 315.

N. P. Ry. Co. v. Pacific Cost Lumber Mfrs. Ass'n., 165 Fed. 1."

In the case of Brown v. Truesdale, 138 U. S. 389, which was a suit "to enjoin the collection of a tax levied to pay interest on county bonds and the making of any further levy, and for a decree declaring the bonds invalid and enjoining the holders from collecting the

same," commenced by several hundred taxpayers, the court in the opinion said:

> "The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon and finally the principal thereof, *and not the mere restraining of the tax for a single year.* The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs each claiming under a seperate and distinct right, in respect to a separate and distinct liability, and that contested by the adverse party, is not applicable here. *For although as to the tax for a particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."*

In the case of Colvin v. City of Jacksonville, 158 U. S. 455, which was commenced by a taxpayer to obtain an injunction preventing the issuance of certain bonds, it was held that "the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy." The court in the opinion cites

the case of El Paso Water Co. v. El Paso, 152 U. S. 157, which was also a suit for an injunction to prevent the issuance of bonds, and quotes as follows from the opinion therein:

> "The bill is filed by the plaintiff to protect its individual interest, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5,000. *So far as respects the matter of taxes, which by the issue of bonds would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.*"

In the case before the court the value of the taxable property of the complainant is stated, the value of all of the taxable property of the city is stated, and, furthermore, it is alleged that the amount of taxes which complainant would be required to pay would exceed the sum of $10,000. It thus appears that the "taxes which, by the issue of bonds, would be cast upon the property of the plaintiff" are shown to be in excess of the jurisdictional amount.

In the opinion in the case of Colvin v. City of Jacksonville, the case of Brown v. Truesdale, 138 U. S. 389, is cited approvingly, and the following language is quoted:

> "The main question at issue was the validity of the bonds, and that involved the levy and col-

lection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

In the case of Beadles v. Smyser, 209 U. S. 393, 28 Sup. Ct. 522, decided April 6, 1908, in which it was sought by mandamus to compel the levy and collection of a tax to pay certain judgments, the court in the opinion said:

"The question is first made as to the jurisdiction of this court, because it is averred that the sum of $5,000 is not involved; but we are of the opinion that the issue made and decided involved the validity of the $16,000 and upwards, of judgments described in the petition and amended writ. The

prayer of the petitioner was for a continuous levy of taxes for the amount permitted by law, to be applied in payment of the judgments. The answer set up that all the judgments were barred by the statute of limitations, and the district court of Noble county determined that the judgments and each and all of them set out in the petition and alternate writ of mandamus had become dormant and were barred by the statute of limitations. This judgment was affirmed by the supreme court of Oklahoma. * * *

"We think the judgment in this case involves the validity of all the plaintiff's judgments, and that the amount in controversy is not simply the fund in the hands of the treasurer, but the amount of all the judgments concerning which relief was sought and which were directly adjudicated to be barred by the statute of limitations."

The argument that the amount of taxes which may be levied in the future is purely speculative is fully answered by the opinon of District Judge Whitson in the case of Board of Trustees v. Berryman, 156 Fed. 112. The suit was for the purpose of an injunction to prevent the levy and collection of taxes against certain property which it was claimed was exempt from taxation. Judge Whitson in the opinion said:

"It is objected that an amount sufficient to sustain jurisdiction is not disclosed, the tax sought to be collected being $946.32; that the amount of the tax, and not the value of the property taxed, furnishes the criterion by which jurisdiction shall

be determined, and that future taxation is so speculative and involved in so much uncertainty as not to be a subject of inquiry; that complainant may not be the owner of the property, and if so future taxs may not be assessed. As to the extent of this rule, we must now inquire."

Reference is made to many authorities. The court further said:

"The scope of the bill is clearly one beyond mere relief against the tax which is mentioned. * *

"It is true the validity of a tax less than $2,000 is incidentally involved, but that can not be construed as a limitation upon the broader purpose in view. The value of the matter in dispute is the test by which jurisdiction is determined."

In the case of Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 225, the court said:

"Besides, the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced."

In the case of Nashville R. Co. v. McConnell, 82 Fed. 65, 74, District Judge Clark uses the following language:

"The loss likely to result in the future enters

into the value of the object of the suit for preventitive relief."

Humes v. Fort Smith, 93 Fed. 857, 862.

Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689, 694.

In Hunt v. New York Cotton Exchange, 205 U. S. 322, 336, the court in the opinion said:

"In Mississippi & M. R. Co. v. Ward, 2 Black, 485, it was decided that jurisdiction is tested by the value of the object to be gained by the bill. To the same effect is Board of Trade v. Cella Commission Co., 145 Fed. 28. In the latter suit the Chicago Board of Trade obtained a decree restraining the use of its continuous quotations by the Cella Commission Company. It was said that the amount or value of such right is not the sum a complainant might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. The latter declaration is supported by Scott v. Donald, 165 U. S. 107."

See generally:

Opinion of this court in Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809.

In concluding the discussion of this branch of the case we respectfully submit that the objection to the jurisdiction is without merit.

II.

SHOULD THE INJUNCTION BE MODIFIED?

In asking for a modification of the injunction it is assumed in behalf of appellant that the lower court only intended to enjoin the sale and delivery of the particular bonds advertised for sale and did not intend to question the authority of the city to incur an indebtedness by the issuance of bonds to the amount of $600,000.00, which authority the city claims by virtue of the election held in the month of April, 1908.

The injunction granted is no broader in its scope than the prayer therefor (Rec. p. 77). In the opinion of Judge Hunt it is said:

> "As temporary injunction must issue, because of reasons already given, I express no opinion at this time upon the other questions raised with respect to the bonds, including the very important question whether the city can issue valid bonds at all until the proper courts have directly decided that it has authority to acquire the right to the use of the waters of McClellan creek, as of superior public need. That a city may generally condemn a water right has been decided by the supreme court of the state in Helena v. Rogan, 26 Mont. 452, but whether the water of McClellan creek that has already been appropriated by ranchmen can be taken by the city upon the ground that the proposed use of the city is a more necessary use seems to be an open question.

Complainant is requested to draw an order."

The "other questions" raised with respect to the bonds are the following:

(a) Is the issuance of bonds for the purpose of procuring a water supply from McClellan creek authorized before it is determined that the city can acquire the right to the use of the waters of said creek?

(b) Should the interest, as well as the principal, be considered in determining the extent of the obligation or the amount of indebtedness which will be incurred by the issuance of the bonds?

(c) Did the authority conferred by the election held in April, 1908, expire at the time of the completion of the assessment roll for that year?

(d) Is it necessary that two elections should be held before bonds of the character of those in question can be issued?

(e) Has the city the right to submit to the taxpayers the question of procuring a particular supply?

(f) If the question of acquiring a particular supply can be properly submitted to the taxpayers can the question be submitted together with the question of incurring an indebtedness and the question of issuing bonds in such a way that the taxpayers must vote for or against all of such questions?

(g) Can the City of Helena acquire by condemnation, or by purchase, any other supply or system than the supply and system now existing?

(h) Is Ordinance No. 717, providing for submission to the voters of the question of issuing bonds, void because it contains several separate and distinct subjects?

We will discuss these questions in the order in which they are stated.

(a) Is the Issuance of Bonds for the Purpose of Procuring a Water Supply from McClellan Creek Authorized before It Is Determined that the City Can Acquire the Right to the Use of the Waters of said Creek.

The notice of the special election stated that the purpose of the election was to submit to the taxpayers

> "* * * the proposition whether or not said City of Helena shall increase its indebtedness over and above the three per cent limit fixed by law, by the issuance—
>
> "(a) Of water bonds of said city to the amount of six hundred thousand dollars for the purpose of securing a water supply for said city from McClellan creek and constructing a water system for said city, which said water supply and water system the city shall own and control and the revenue from which shall be devoted to the payment of the in-

debtedness incurred therefor." (Rec. p. 100.)
Section 3458 of the Revised Codes provides:

"The money arising from the sale of bonds must be paid into the city or town treasury, and applied only to the purpose for which the bonds were issued."

In the bill of complaint as amended it is alleged:

"That all of the waters of McClellan creek has been appropriated and is now being used for irrigation purposes on the lands adjacent to McClellan creek, and in the vicinity thereof, and located within the basin through which said creek flows, and that said water is ~~now~~ not available for supplying said city and its inhabitants with water; that the said City of Helena has no interest in and does not own or control the waters of McClellan creek or any part thereof, and has no right or authority to convey the said waters or any part thereof to the City of Helena, and that if said water system is so constructed to the said McClellan creek for the purpose of conveying the said water to the City of Helena the said city can not appropriate and convey said water to the said City of Helena, and the said plant so constructed will be useless for that purpose." (Rec. pp. ~~69~~ 69 and 70.)

In the answer it is alleged that actions have been instituted and are now pending for the purpose of acquiring the right to the use of the waters of McClellan creek by the exercise of the power of eminent domain. (Rec. pp. 173-174.)

Sec. 15 of Art. 3 of the Constitution declares that:

> "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution or other beneficial use * * * shall be held to be a public use."

Section 7333 of the Revised Codes provides that private property appropriated to a public use may be taken by virtue of the power of eminent domain, "but such property must not be taken unless for a more necessary public use than that to which it has already been appropriated."

In the opinion in the case of City of Helena v. Rogan, 26 Mont., 452, which was a proceeding instituted by the city to acquire by condemnation the right to the use of the waters of McClellan creek, the court said:

> "Another question presented is this: Can water already appropriated to a public use be condemned in eminent domain proceedings for any other use, whether the use is a more necessary public use or not? Section 2214 of the Code of Civil Procedure provides that: 'Before property can be taken it must appear: * * * (3) If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.' It must so appear in the complaint. The use of water to irrigate a farm under the water right law is a public use. (Section 15, Art. III, Constitution; Ellinghouse v. Taylor, 19 Mont. 462; 48 Pac. 757.) The law permits the condemnation of a water right by a city, as we have seen. Therefore the position

taken by respondents, to-wit, that water which is being used for any beneficial use can not be taken for any other use, whether the other use is a more necessary public use or not, is not tenable. Whether the use of water by the city is necessary—that is, whether the city needs a water supply—is for the city, and for the city alone, through its council, to say. Whether it is necessary to condemn the water right in order to supply the city is to be alleged, and a judicial question to be determined by the court. That it is a more necessary use than that of the ranchman is to be alleged, and by the court judicially determined. If it were not, then not only could a city condemn and take the water from a ranchman owning and irrigating 160 acres of land, but could, on its own allegation of superior necessity, condemn and take the water from another and a neighboring city, and leave it dry. And here again we may, in passing, say that the necessity for a complete description of the property to be taken is necessary, to the end that the court may see that the proposed use is superior in point of necessity to the present public use.

"The right to take depends largely upon the superior necessity. In 1886 this court, in City of Helena v. Harvey, 6 Mont. 114, 9 Pac. 903, held that the right of the city to have the property condemned must be stated in the complaint. (Revised Statutes of 1879, Code of Civil Procedure, Sec. 586.) The right will depend, among other things, upon the answer to the question: Is the intended use superior in point of necessity to the present use? Enough must be alleged to show to the court that it is. The mere statement that it is a use superior

in necessity would not be sufficient without the facts as to the present use coupled with those appertaining to the intended one."

If it should be determined that the use for which the city is seeking to acquire the water of McClellan creek is not a more necessary use than that to which the water is now applied, then the money realized from the sale of the bonds in question could not be used for the purpose for which the indebtedness is proposed to be incurred. As the money can not be used for any other purpose (Sec. 3458, Rev. Codes), it necessarily follows that until the right to acquire the supply from McClellan creek has been determined, there is no authority to issue and sell the bonds. In the case of City of Helena v. Rogan it was decided that the city can have the question of the right to acquire a supply by condemnation determined before it has authority to incur an indebtedness for such supply, but it was not decided that the indebtedness can be incurred before the right to acquire the supply is determined.

As it appears that all of the water of McClellan creek has been appropriated, and the use of water is declared to be a public use, it is necessary for the city, in order to acquire the right to the use of such water, to allege and prove that the use for which it is seeking to take the water is a more necessary public use than the use for irrigation.

City of Helena v. Harvey, 6 Mont., 114-118.

2 Lewis on Eminent Domain, 2d Ed., p. 894.

Until the evidence pro and con on the issue of a more necessary public use has been introduced and considered, even the court in which the proceedings are pending can not say whether or not the city can acquire the right to the use of such water. As said by the court in the opinion in the case of City of Helena v. Rogan, 26 Mont., 476:

> "Is the intended use superior in point of necessity to the present use? Enough must be alleged to show to the court that it is. The mere statement that it is a use superior in necessity would not be sufficient without the facts as to the present use coupled with those of the intended use."

We therefore submit that an indebtedness can not be incurred to procure a water supply from McClellan creek until it has been determined that such a supply can be procured.

(b) Should the Interest, as well as the Principal, Be Considered in Determining the Extent of the Obligation or the Amount of Indebtedness Which Will Be Incurred by the Issuance of the Bonds?

Sec. 6 of art. 13 of the Constitution of the State of Montana provides:

> "No city, town, township or school district shall be allowed to become indebted *in any manner or for any purpose to an amount,* including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and *all bonds or obligations* in excess of such amount given by or on behalf of, such city, town, township or school district shall be void."

When the three per cent limit is extended by virtue of the proviso to the section, a city is prohibited from becoming indebted in any manner or for any purpose in excess of the extended limit, and the declaration that "all bonds and obligations" in excess of the three per cent limit shall be void, applies equally to bonds and obligations in excess of the extended limit. In other words, where the limit is extended the prohibition and declaration contained in the first part of the section apply to the extended limit.

The court in the case of State v. City of Helena,

24 Mont. 521, had under consideration the question of what constitutes a debt or an indebtedness within the prohibition of the Constitution. The case involved the validity of a contract by which the city had agreed to pay for water furnished a stated amount each year for a term of years. The court in the opinion said:

> "The first question we shall consider is: Did the City of Helena, by entering into the contract for a water supply, incur an 'indebtedness,' within the meaning of that term as it is used in sec. 6 of art. 13 of the Constitution of Montana?"

In the discussion of this question the court quotes approvingly from the opinion in the case of Burlington Water Co. v. Woodward, 49 Iowa, 59 as follows:

> "It is believed that the Constitution applies not only to a present indebtedness, but also to such as is payable on a contingency at some future day, or which depends on some contingency before a liability is created. But it must appear that such contingency is sure to take place, irrespective of any action taken, or option exercised, by the city in the future. That is, if a present indebtedness is incurred, or obligations assumed, which, without further action on the part of the city, have the effect to create an indebtedness at some future day, such are within the inhibition of the Constitution. But if the fact of the indebtedness depends upon some act of the city, or upon its volition, to be exercised or determined at some future date, then no present indebtedness is incurred, and none will be

until the period arrives, and the required act or option is exercised, and from that time only can it be said there exists an indebtedness."

The court further quotes from the opinion in the case of City of Springfield v. Edwards, 84 Ill. 226, as follows:

"The prohibition is against becoming indebted, —that is, voluntarily incurring a legal liability to pay,—'*in any manner or for any purpose*,' when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute,—the debt exists,—and it differs from a present, unqualified promise to pay only in the *manner* by which the indebtedness was incurred. And, since the *purpose* of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses of for something else."

After referring to numerous authorities, the court said:

"If, by entering into the contract before us, an indebtedness was not created, what was the purpose of section 11 of the ordinance, wherein the city bound itself during the term of five years to levy annual taxes under the provisions of the Political Code authorizing the levying of taxes for general purposes to pay for water supplied under the contract? It may well be said that this obligation in itself implies the existence of a debt in favor of the appellant and against the city.

"It follows, from the view we have taken of the proposition before us, that the question asked in the beginning of this opinion must be answered in the affirmative."

It would seem that the opinion and decision of the court, from which the foregoing quotations are made, is conclusive of the proposition that the interest is as much a part of the indebtedness as the principal itself. By the issuance of the bonds in question the city incurs the obligation to levy and collect taxes to pay the interest as it matures. As said by the court, the obligation thus imposed upon the city "in itself implies the existence of a debt." If the obligation to pay for water as the same is furnished constitutes a debt, then by no process of reasoning can the obligation arising from the promise to pay a stated amount of money at a certain time be anything but a debt. The obligation to pay interest on the bonds requires the levy and collection of a tax just the same as the obligation to pay the principal.

If the interest is not a part of the debt, then the constitutional provision does not accomplish the purpose it was intended to accomplish. There is no limitation of the amount of interest which a city can pay for a loan. When bonds are offered for sale they may be sold to the person who will pay the highest premium or to the person who will take them at the lowest rate of interest. Let us assume that three per cent of the assessed valuation of the property of a city is a hundred thousand dollars. It is the desire of the city to obtain one hundred and fifty thousand dollars for certain purposes. Good municipal securities, bearing four per cent interest, can be sold at par. One hundred thousand dollars of bonds, payable in twenty years, and bearing interest at eight per cent, can be sold at a premium of fifty thousand dollars. Now, if the interest to be paid on bonds is not a part of the indebtedness which is created by the issuance of the bonds, what is there in the Constitution to prevent an agreement to pay interest at a rate which will enable a city to secure an amount of money largely in excess of three per cent of the assessed value of the taxable property therein?

It was clearly the intent of the framers of the Constitution that the burden to be imposed upon the taxpayers of a city should be limited without regard to whether the taxes to be collected are used for the payment of the principal or interest. It seems to us that the test by which to determine the extent of indebt-

edness created is the amount of taxes required to be levied and collected to satisfy the obligation. This is the test applied by the court in the case of the State v. City of Helena, *supra,* and is certainly the true test. Any other construction of the constitutional provision would not furnish protection to the taxpayers, because the burden on the taxpayers could be increased by the payment of a rate of interest in excess of the value of the use of the money borrowed.

The Constitution says "all bonds or obligations in excess of such amount * * * shall be void." This language makes the question of indebtedness depend upon the existence of an obligation. If there is an obligation, there is an indebtedness.

The court in the case of State v. Hickman, 11 Mont. 541, in the opinion said:

> "In Appeal of Erie, supra, the court construed a section of the Constitution which provided that 'the debt of any county * * * shall never exceed seven per centum upon the assessed value of the property therein,' and said: 'A debt means a fixed and certain obligation to pay money, or some other valuable thing or things, either in the present or in the future. * * * It is idle to urge that the restriction includes only a bonded indebtedness, for such is neither the constitutional letter nor spirit. A floating debt usually ends in a bonded debt, and the former is just as obligatory as the later.' * * *
>
> "Blackstone says: 'Whatever, therefore, the

laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge.' * * *

"The interest which has been prescribed by law is an inseparable part of the liabilities or obligaitons which are evidenced by the warrant."

In the case of State Savings Bank v. Barrett, 25 Mont. 112, the court held that the contract to pay interest constitutes an obligation just the same as a contract to pay the principal, and that a law relieving the party from the obligation to pay interest as contracted impairs the obligation of the contract. The court in the opinion said:

"That which binds a party to the fulfillment of his agreement is the obligation of a contract. It consists of the duty which the law imposes upon the parties to perform their agreement. The duty which the law casts upon a party to comply with the terms of the contract which he has promised to perform, is therefore the obligation of his contract. Impairment of this obligation by state legislation is prohibited."

The question whether a contract to pay interest creates an indebtedness was fully and ably considered in the case of Coulson v. Portland, Fed. Cas. No. 3275. In that case the City of Portland became liable for the payment of the interest upon certain bonds issued by a railroad company. Judge Deady in the opinion said:

"The second objection raises the question, Can

the city lawfully issue interest coupons to railway bonds, payable half yearly through a period of twenty years, and amounting in the aggregate to over $300,000? The charter (section 135) seems to answer this question in the negative, when it substantially declares in pursuance of section 5 of article 11 of the constitution that the indebtedness or liability of the city must never exceed in the aggregate one sixth of that sum. But the defendants insist, that as the ordinance providing for the issue of these coupons also provides for raising revenue and appropriates it to the payment of them as they fall due, no indebtedness or liability is thereby created or incurred. In support of this extraordinary proposition they cite the single case of People v. Pacheco, 27 Cal. 175 * * *

"These constitutional provisions restraining the creation of public debts are the gradual outgrowth of the last twenty or thirty years. They have been erected by the peoples of various states as barriers against the creation of debt by the legislautre in a time of popular excitement about internal improvements. In the adoption of these and kindred provisions in the constitution of this state, the people of Oregon supposed that they were thereby putting it out of the power of the assembly and municipal corporations, to pledge the present and future property and labor of the country, for the payment or guarantee of stocks or bonds of private corporations formed for building railways and the like, for the benefit primarily of a few individuals.

"To say that a sum of money due or owing from A to B, is not a debt, because A has promised to appropriate, or has appropriated, a portion of

his future income to its payment, is a proposition in legal metaphysics that I can not comprehend. A debt exists against the city whenever the city agrees to pay money in return for services or for money borrowed. Every one of these interest coupons, when issued by the mayor and auditor as provided in the ordinance, is a promise by it to pay to the holder so much money. *If this is not a debt, or evidence of one, then an ordinary promissory note is not.* The fact that the ordinance appropriates money to pay these coupons, as they fall due, makes no difference. There is no magic in the legislative formula—'there is hereby appropriated.' That does not change the fact that the city owes these coupons, and what it owes to another is a debt due that other. Besides, there is no money in fact set apart by this formula of appropriation, until it is collected.

"The ordinance, by providing for the levy and collection of taxes to pay these coupons, recognizes the fact that their issue creates a debt against the city, and thereby undertakes to provide means of payment."

The Coulson case is cited by the supreme court of the United States in the opinion in the Walla Walla case, 172 U. S. 1, as an authority in support of the proposition that a contract to pay for something to be furnished in the future creates a debt.

In the case of Herman v. City of Oconto, 86 N. W. 681, the court, in discussing the question of a contract to pay interest creating a debt, said:

"The only case which in any way supports the

theory in question is Coulson v. Portland, Fed. Cas. No. 3275, which denied the right of the defendant city to issue interest coupons to railway bonds payable half-yearly through a period of twenty years. We decline to follow it. *Interest rests upon much the same grounds as contracts for light and water.* There may exist an obligation to pay, but, under the constitution, the indebtedness as to interest comes into existence each year as the obligation matures. It can not be said to be a present indebtedness, under any reasonable construction of the constitution."

It will be noticed that the court places the obligation to pay interest upon the same basis as the obligation to pay for light or water furnished. In Wisconsin it is held that a contract to pay for light or water as furnished does not create an indebtedness at the time the contract is entered into. It is apparent that if the Wisconsin court had adopted the rule announced in the case of State v. City of Helena, 24 Mont. 521, that court would have held that a contract to pay interest creates a debt.

As it is conceded that the principal and interest of the bonds proposed to be issued will exceed in amount the limit of indebtedness which the city is authorized to incur, it follows that if the interest as well as the principal is to be considered in determining the amount of indebtedness, the indebtedness in question is unauthorized.

(c) Did the Authority Conferred by the Election Held in April Expire at the Time of the Completion of the Assessment Roll for 1908?

Sec. 6 of art. 13 of the Constitution of Montana requires that the question of extending the limit of indebtedness over and above the three per cent shall be submitted to a "vote of the taxpayers *affected thereby.*" The taxpayers to be affected by incurring an indebtedness at this time are those whose names appear upon the last assessment roll and against whom a liability for taxes will exist at the time the indebtedness is incurred. There may be, and probably are, several hundred taxpayers on the assessment roll for this year who were not taxpayers at the time the election was held. On the other hand, there may be many of the taxpayers who voted or were entitled to vote at the election held in April, 1908, who have sold their property and whose names do not appear on the assessment roll for the year 1908. The Constitution, in providing that the question of incurring the indebtedness shall be submitted to the taxpayers "affected thereby," clearly intended that the taxpayers owning property at the time the indebtedness is incurred shall have the right to vote on the question of incurring the indebtedness. It is the incurring of the indebtedness, and not the authority to incur the indebtedness that affects the taxpayer. When the in-

debtedness is incurred his property, together with the other property in the city, is charged with a liability for the payment of such indebtedness through the medium of taxes. The value of his property depends upon the amount of taxes for which the property is or will be liable. It is impossible to give effect to the words "affected thereby," unless the construction here contended for is adopted. If an indebtedness can be incurred a year after an election, then it can be incurred ten years later, when, perhaps, a large majority of the taxpayers who voted at the election have died or disposed of their property, and can in no manner be affected by the incurring of the indebtedness.

In ascertaining the amount of indebtedness which may be incurred, reference must be made to the "last assesment for the state and county taxes previous to the incurring of such indebtedness." This is the mandate of the Constitution. If the taxpayers vote to incur an indebtedness to the full amount that can be incurred at the time the election is held, and before the indebtedness is created a new assessment is made reducing the value of the taxable property, the authority conferred by the election at once becomes inoperative. It is reasonable to suppose that the framers of the Constitution intended the last assessment previous to incurring the indebtedness to control not only as to the amount of the indebtedness, but also in determining who "the taxpayers affected thereby" are. Unless the time within

which the indebtedness may be incurred is limited, as contended, there is no limit, and the requirement of the Constitution that "the question" shall be submitted "to a vote of the taxpayers affected thereby" does not mean what it says. The words "affected thereby" must be given some significance. The granting of authority to incur the indebtedness does not affect the taxpayers, but it is the incurring of the indebtedness that affects them. In using the expression "taxpayers affected thereby," it was clearly intended to prohibit one set of taxpayers from authorizing the incurring of an indebtedness which would affect another set of taxpayers.

It appears from the answer that the assessment roll for the year 1908 had been completed prior to the 17th day of December, 1908, the date of the filing of the answer (Rec. p. 172.) Section 2609 of the Revised Codes provides as follows:

> "On or before the first Monday of October he, (the county clerk) must deliver a copy of the corrected assessment book, to be styled 'duplicate assessment book' to the county treasurer," etc.

It follows, of course, that the assessment roll for the year 1908 was completed prior to the first Monday of October of that year.

The only authority we have been able to find which has any bearing upon this question is the case of Scipo v. Wright, 101 U. S. 665. In that case the court upheld the validity of the bonds, because the indebtedness had

been fully incurred, and the transaction consummated, before a new assessment roll had superseded the one in force at the time when the authority for incurring the indebtedness was given. This point is clearly pointed out and emphasized in the opinion of the court, as follows:

> "Recalling the facts, heretofore stated, the written assent of the required number of taxpayers on the assessment roll of 1852 was obtained and verified, and it was filed on the 11th of January, 1853. Then the authority to issue the bonds, borrow the money, subscribe for the stock and elect railroad commissioners became perfect. The town did elect railroad commissioners on the first of March, 1853, the subscription for the stock of the company was made, a debt of $25,000 therefor was incurred, and the bonds or notes for an equal amount were executed, and at least some of them were sold at par and the proceeds of the sale were paid on account of the subscription, *all before any new assessment roll could be completed and before the law required any to be made.* For all this there was complete authority, everything was done which was required to authorize the creation of the indebtedness to the railway company. * * * It may be admitted the legislature did not intend that the power conferred upon the railroad commissioners should continue indefinitely. Hence the assent of two thirds of the resident taxables, as appearing on the assessment roll made next previous to the borrowing of the money, was required. But evidently by this was meant, that the assent should be given by the taxpayers appearing on the roll made next before any debt of the township *should be incurred.*"

(d) Is it Necessary that Two Elections Should Be Held before Bonds of the Character of Those in Question Can Be Issued?

The authority of a city to incur an indebtedness does not embrace authority to issue bonds. The authority to issue bonds must be expressly conferred and can not be implied from the power to incur an indebtedness.

City of Brenham v. Bank, 144 U. S. 173.

Lehman v. San Diego, 83 Fed. 669.

1 Abbott Mun. Corp., 169a-170.

Nashville v. Ray, 9 Wall. 468.

Hill v. Memphis, 134 U. S. 204.

The legislative assembly may extend the limit of indebtedness prescribed in sec. 6 of art. 13 of the Constitution by authorizing the city to submit the question to a vote of the taxpayers affected thereby. This requires an election to determine *the question* of extending the limit or incurring an indebtedness before the authority to incur the indebtedness exists.

By subd. 64 of sec. 3259 of the Revised Codes it is provided that the "limit of three per centum shall not be extended unless the question shall have been submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of the majority

of said taxpayers who vote at such election." Here is an express provision of the statute requiring an election at which the question of extending the limit may be submitted, in accordance with the requirement of the Constitution. When the question referred to in the Constitution and in the statute has been submitted to the taxpayers, and a favorable vote has been obtained, an indebtedness may be incurred.

The holding of such an election is for the purpose of opening the door so as to permit the incurring of the indebtedness and not for the purpose of authorizing the issuance of bonds.

In the case of Lehman v. San Diego, 83 Fed. 669, decided by the circuit court of appeals for this circuit, a statute of the State of California authorizing the City of San Diego "to borrow money upon the faith and credit of the city," and providing that "no loan shall be made without the consent to such loan of a majority of the real estate owners of the city residing therein previously obtained," was considered. It appeared that the consent of the real estate owners had been obtained and that money had been borrowed upon bonds issued. The court declared the bonds invalid, even in the hands of bona fide purchasers, for the reason that the authority to make a loan did not include authority to issue bonds.

Subd. 64 does not confer authority to issue bonds in excess of the three per cent limit. This subdivision

authorizes the issuance of bonds to the three per cent limit for the purpose therein specified, but requires as a condition to the issuance of bonds within the three per cent limit for a sewerage system, or water supply, that the proposition must be submitted to a vote of the taxpayers. Secs. 3454-3460 of the Revised Codes authorizes the issuance of bonds in excess of the three per cent limit after the authority to incur an indebtedness in excess of such limit has been conferred by a vote of the taxpayers, as provided in the Constitution and subd. 64.

Sec. 3454 provides that "whenever the council of any city of town, having a corporate existence in this state, or hereafter organized under the provisions of this title, shall deem it necessary to borrow money or contract indebtedness *under its powers as set forth in subdivision 64 of section 3259* of the Political Code, or amendments thereto, the question of issuing bonds or contracting such indebtedness shall first be submitted to the qualified electors," etc.

Until, therefore, the election upon the question of extending the limit or incurring an indebtedness has been held the power to borrow money or contract an indebtedness in excess of the three per cent limit, "as set forth in subdivision 64," does not exist . It follows that not until an election has been held as provided in subd. 64, the election upon the question of issuing bonds in excess of the three per cent limit can not be held.

As the Constitution requires the submission of the question of extending the limit or incurring the indebtedness, there is no authority by virtue of the Constitution to submit any other question. The taxpayers have a right to vote upon this question without being compelled to grant authority to issue bonds. The proposition to extend the limit or incur an indebtedness by the issuance of bonds is a log rolling proposition. Many taxpayers may be in favor of incurring indebtedness and against the issuance of bonds, but when the proposition to incur an indeptedness by the issuance of bonds is presented, they have no choice.

The fact that subd. 64 authorizes the contracting of an indebtedness to the three per cent limit for a sewerage system or a water supply, without the consent of the taxpayers, but provides that if such indebtedness is to be contracted by the issuance of bonds the consent of the taxpayers must be obtained, clearly shows that the power to issue bonds was regarded by the legislative assembly as distinct from the power to incur an indebtedness.

It is provided in sec. 3455 that "at such election the ballots must contain the words, 'bonds—yes; bonds —no.'" This is not "the question" which the Constitution and subd. 64 require to be submitted in order to authorize the incurring of an indebtedness in excess of the three per cent limit.

It could, with just as much reason, be said that a

municipality might, by submitting the question of extending the limit or incurring an indebtedness in excess of the three per cent limit, secure authority to issue bonds, provided the taxpayers are advised that a favorable vote upon the question would be taken and considered as conferring such authority, as to say that a vote upon the question of issuing bonds may also be taken and considered as a vote upon the question of extending the limit. In other words, if a vote upon the question of issuing bonds may authorize the incurring of an indebtedness, then for the same reason a vote upon the question of increasing the indebtedness may authorize the issuance of bonds.

So far as the incurring of an indebtedness in excess of the three per cent limit is concerned, subd. 64 has to do solely with the question of obtaining the power to incur an indebtedness, and secs. 3454-3460 have to do solely with the exercise of the power, after it has been conferred by the issuance of bonds. Subd. 64 defines the question to be submitted for the purpose of authorizing the incurring of the indebtedness, and sec. 3455 defines the question to be submitted for the purpose of authorizing the issuance of bonds. Where is the authority to submit both of these questions as one, or to say that a vote upon one question shall also be a vote upon the other? Bearing in mind that the authority to incur an indebtedness does not embrace authority to issue bonds, and that this is recognized by

the legislative assembly of Montana in making express provision for the issuance of bonds, it should not require any argument to support the contention that two elections are necessary before the bonds in question can be issued.

If two elections are required, or if two questions are to be submitted, the election held did not confer any authority.

Rea v. Fayette, 61 S. E. 707.

Denver v. Hayes, 63 Pac. 311.

Lewis v. County, 12 Kans. 186, p. 213.

Elyria v. G. & W. Co., 49 N. E. 335.

Farmers L. & T. Co. v. Sioux Falls, 131 Fed. 913.

City of Leavenworth v. Wilson, 76 Pac. 400.

McMillan v. County, 3 Iowa, 311.

(e) Has the City the Right to Submit to the Taxpayers the Question of Procuring a Particular Supply?

The notice of the special election stated that the purpose of the election was to submit to the taxpayers

> "* * * the propositions whether or not said City of Helena shall increase its indebtedness over and above the three per cent limit fixed by law, by the issuance—

"(a) Of water bonds of said city to the amount of six hundred thousand dollars for the purpose of securing a water supply for said city from McClellan creek and constructing a water system for said city, which said water supply and water system the city shall own and control and the revenue from which shall be devoted to the payment of the indebtedness incurred therefor."

The ordinance, No. 717 (Exhibit A to the complaint), directed that a special election should be held for the purpose stated in the notice.

Sec. 3259 of the Revised Codes provides that:

"The city or town council has power * * *

"79. To adopt, enter into, and carry out means for securing a supply of water for the use of the city or town or its inhabitants."

Subd. 64 of Sec. 3259 reads in part as follows:

"For the purpose of providing the city or town with an adequate water supply for municipal and domestic purposes, the city or town council shall procure an appropriate water right and title to the same and the necessary real and personal property to make said rights and supply available, by purchase, appropriation, location, condemnation, or otherwise."

By virtue of these provisions of the statute the city council is vested with power to procure a water supply which involves the exercise of discretion in determining the particular water supply to be acquired.

By submitting to the taxpayers the question of procuring a water supply from McClellan creek, the city council delegated a power which the law has declared it shall exercise and which could not be delegated. One of the main considerations which should control a city council in procuring a particular water supply is the cost thereof. The taxpayers are not advised of the cost; and if the bonds in question are issued the city council must necessarily take a supply from McClellan creek, without reference to the cost. This, of itself, shows the necessity of the city council exercising the power instead of delegating the power to someone else.

The rule is that a municipal council can not delegate a power repuiring the exercise of judgment and discretion.

28 Cyc., pp. 276-278.

2 Abbott on Mun. Corp., p. 575.

In the case of In re Quong Woo, 13 Fed. 229, Mr. Justice Field said:

> "The question presented is the validity of the ordinance in requiring, for the issue of a license to 'establish, maintain, or carry on' a laundry within the limits mentioned, the recommendation of twelve citizens and taxpayers in the block in which the laundry is to be 'established, maintained, or carried on.' * * * If the recommendation of any parties in the block can be required as a condition of

granting the license for either of these purposes, the number is a matter of discretion with the supervisors. They may require the recommendation of double or treble the number designated; they may exact the unanimous recommendation of the citizens and taxpayers of the block. Nor need they confine the recommendation required to citizens and taxpayers; any other class may be equally designated. They may require it of some of our worthy resident aliens from Europe—gentlemen of Irish or German nativity. Indeed, if they can make the exercise of their legislative power in the granting of licenses depend upon the approval of anybody else, they may place the approval with whomsoever they may deem best, and no one can control their action."

See also:

St. Louis v. Russell, 20 L. R. A. 721.

Blair v. City of Waco, 75 Fed. 800.

If the city can delegate the right to decide to a majority of the taxpayers, the right might be delegated to any number of taxpayers. The minority taxpayers are entitled to the exercise of the judgment and discretion of the city council, instead of having the matter determined by the majority of the taxpayers. There is no authority in the law for submitting the question, but on the contrary, the power to procure a water supply has been vested in the city council. Sec. 3458 of the Revised Codes provides:

"The money arising from the sale of bonds

must be paid into the city or town treasury, and applied only to the purpose for which the bonds were issued."

It thus apears that when the bonds are issued the proceeds thereof must be used to purchase a water supply from McClellan creek, without reference to any considerations which might induce the present city council to acquire a supply from another source.

(f) If the Question of Acquiring a Particular Water Supply can be Properly Submitted to the Taxpayers, Can the Question Be Submitted Together with the Question of Incurring An Indebtedness and the Question of Issuing Bonds in Such a Way that the Taxpayers Must Vote for or Against All of Such Questions?

We submit that the question just stated must be answered in the negative. There may be many taxpayers, and presumably there are, who are in favor of municipal ownership, but who are not in favor of acquiring a water supply from McClellan creek. These taxpayers were not permitted to give expression to their will with reference to the municipal ownership of a ~~municipal ownership, but who are not in favor~~ of acquiring a water supply from McClellan creek. There

is no authority in law for attaching any condition to a vote upon the proposition of incurring an indebtedness, or a vote upon the proposition of issuing bonds. If the city council can, without legislative authority, attach one condition, it may attach another, and throw out all kinds of bait to bring about one result or another. The city might make the issuance of bonds conditional upon the character of the system to be installed, or upon letting the contract for the construction of a system to a particular person, etc., etc.

Assuming that the city had the authority to submit the question of procuring a particular water supply, in submitting the question in the way it did it was guilty of log rolling, and its action is illegal, according to all the authorities.

Rea v. La Fayette, 61 S. E. 707.

Denver v. Hayes, 63 Pac. 311.

Lewis v. County, 12 Kans. 186, p. 213.

Elyria v. G. & W. Co., 49 N. E. 335.

Farmers L. & T. Co. v. Sioux Falls, 131 Fed., 913.

City of Leavenworth v. Wilson, 76 Pac. 400.

McMillan v. County, 3 Iowa, 311.

(g) Can the City of Helena Acquire by Condemnation, or by Purchase, Any Other Supply or System than the Supply and System Now Existing?

The authority to acquire a water supply by purchase or condemnation is conferred by Subd. 64 of Sec. 3259 of the Revised Codes. This subdivision also provides that where, pursuant to a franchise granted by a city, "a system of water supply" has been established or maintained, such city must purchase such system and supply, and if it can not agree for the purchase it shall condemn the same.

The legislative assembly has the right to grant or withhold the power of eminent domain. In granting the power it may do so conditionally. As a city is a creature of the legislative powr of the state, the right to purchase a water system and supply can be granted or withheld, or granted conditionally. These propositions are well recognized.

By Subd. 64 the legislative assembly has granted the power of eminent domain, and also the right to purchase, upon the condition that, where there is an existing system and supply established pursuant to a franchise, the existing system and supply must be purchased or condemned, if the city desires to acquire a system and supply.

Whatever may be said, then, with reference to

the validity of that part of Subd. 64, requiring the purchase or condemnation of an existing plant, being unconstitutional, for the reason stated in the opinion in the case of Steele v. City, 24 Mont., it is a valid enactment to the extent that it imposes a condition upon the right of a city to purchase or condemn a water supply. If, however, such part of said subdivision is invalid for all purposes, then it necessarily follows that the power to purchase and condemn granted thereby must fail. Where a power is granted conditionally, if the condition is illegal, it can not be said that the power would have been granted without the condition, and consequently the power does not exist.

We therefore submit that if the City of Helena has power to purchase or condemn a water supply, it can only acquire the existing plant.

(h) Is Ordinance No. 717, Providing for the Submission to the Voters of the Question of Issuing Bonds Void, Because it Contains Several Separate and Distinct Subjects?

Ordinance No. 717 provides for the submission to the voters of Helena of the question of issuing $600,000 water bonds and $70,000 in sewer bonds.

Sec. 3265 of the Revised Codes provides that:

"No ordinance shall be passed containing more than one subject which shall be clearly expressed in its title, except ordinances for the codification and revision of the ordinances."

Constructing or purchasing water works, and constructing sewers are two separate and distinct subjects. The question of issuing bonds to procure a water system and the question of issuing bonds to construct a sewerage system are separate and distinct questions or subjects.

Yessler v. City of Seattle, 25 Pac. 1014.

This provision of the Codes in relation to ordinances is similar to the provision in the Constitution relating to acts passed by the legislature, and it has been often held that a legislature can not pass an act containing two subjects.

State v. Mitchell, 17 Mont. 67.

State v. Brown, 29 Mont. 179.

The city council is bound and restricted by the provisions of the statute in like manner, and to the same extent, as the legislature is bound by the provisions of the Constitution.

The provisions of the statute are mandatory upon the city council, and an ordinance containing more than one subject is void.

Missouri P. R. Co. v. Wyandotte, 23 Pac. 950.

Stebbins v. Mayor, 16 Pac. 745.

This ordinance also has to do with (a) extending the limit of indebtedness of a city; (b) issuing bonds; and (c) procuring a supply of water from McClellan creek. Each of these is a distinct and separate subject. The ordinance is clearly in violation of the statute, and therefore void.

Sylvia v. City of Newport, 84 S. W. 741.
Marion Water Co. v. Marion, 96 N. W. 887.
Missouri P. R. Co. v. Wyandotte, 16 Pac. 745.

In view of the questions presented the preliminary injunction properly issued and should not be modified.

So. Pac. Co., v. Earl, 82 Fed. 690.
City of Newton v. Lewis, 79 Fed. 715.

In the last case cited Circuit Judge Sanborn said:

> A preliminary injunction maintaining the status quo may properly issue whenever questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

Respectfully submitted,
MILTON S. GUNN, and
CARL RASCH,
Solicitors for Complainant.

APPENDIX.

OPINION OF HON. WM. H. HUNT.

HUNT, Judge (Orally):

It is important, as affecting public interests in the city of Helena, that a conclusion be announced in this case as soon as possible, to the end that review may be sought before the court of appeals without unnecessary delay. The unusual pressure of business before the court is such, however, that I will only state my conclusions and indicate the reasons therefor.

The learned counsel for the defendants have questioned the jurisdiction of this court, contending that, although a purpose of the bill is to prevent the issuance and delivery of the $600,000.00 of bonds, yet the amount in controversy is simply the tax levied against the property of the complainant for the year 1908, which only amounts to $398.50. Complainant, on the other hand, argues that this court has jurisdiction, in that the main purpose of its bill is to prevent the carrying out of the contract for the construction of the water system, and to prevent the issuance and delivery of the $600,000.00 of bonds, and that prevention of the collection of the tax already levied is merely incidental to the main relief sought. A careful reading of the bill convinces me that the position of the complainant is correct.

What it really seeks to do is to prevent the city of Helena from entering into the proposed contract for the erection of water works, and the issuance and delivery of $600,000.00 of the bonds of the city to procure money to pay for the proposed new water system. There is, accordingly, involved the very important question whether the city has the right and power to enter into such proposed contract, and to issue such proposed bonds. The case thus presents an instance of a taxpayer questioning the validity of a proposed issue of bonds of $600,000.00, and of a contract involving over $200,000.00, and also of the levy and collection of taxes for years to come to pay interest and principal on the bonds. Under such a state of facts, a taxpayer, whose taxes during the period of years provided for in the bonds, would exceed the sum of two thousand dollars, has a right to invoke the jurisdiction of the circuit court of the United States, provided always, diversity of citizenship exists.

City of Ottumwa v. Water Supply Co., 119 Fed. 315.

N. P. Ry. Co. v. Pacific Coast Lumber M. Assn., 165 Fed. 1.

Passing, then, directly to the attempted sale of the bonds to the American Light & Water Company, it must be remembered, as a premise, that the complainant is seeking relief before there has been any delivery

of the bonds, and therefore is in a very different position from that occupied by a taxpayer who has waited until after a sale and delivery. Testing the rights of the parties under such conditions, the court will scrutinize the acts of the city much more closely than it would if an innocent purchaser held the bonds.

It is plain that under section 3456 of the Revised Codes of Montana, the city council, desiring to sell municipal bonds, must advertise that the sale of bonds, which may be issued, will be at public auction at a time and place to be designated in the notice. It is important to note that while the municipality may exercise some discretion with respect to the time and place where a sale of bonds will be had, the mode of sale must be by public auction. Now, a sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another, an interest in property; and when the city of Helena gave notice that it would sell at public auction at the council chambers at Helena "to the highest bidder for cash $600,000.00 of gold bonds," etc., and that the bonds, when duly executed and prepared, should be delivered to the purchaser upon payment of the purchase price, its power was limited to the making of such a sale as has just been defined. Furthermore, a sale by auction is a sale made by public outcry to the highest bidder on the spot, and is completed when the auctioneer publicly announces by the fall of his hammer, or in any other customary manner, that

the thing is sold.

Secs. 5122, 5123, Revised Codes of Montana.

But I find that there has been a serious departure from these rules of guidance in this: The American Light & Water Company, at the time of the advertised sale, made an offer in writing to purchase the said $600,000.00 issue of water bonds, and to pay therefor the par value thereof, and accrued interest thereon, and a premium of $4,600.00. The offer made by said company also contained a clause to the effect that the city should give the bidder a transcript of all proceedings had with relation to the bonds, and that prior to the delivery of the bonds and payment therefor, they "shall be approved as legally valid and binding obligations of the city of Helena, state of Montana, by our counsel, Messrs. Dillon and Hubbard of New York, and Charles A. Loomis, of Kansas City, Missouri." The city accepted this offer.

My best judgment is, however, that where the action of the city is tested before delivery of the bonds, the court must hold that, in such acceptance, the city exceeded its authority. I do not believe that there was a contract made, by which, for a consideration, there was a *transfer* which amounted to a sale. The bid was a conditonal one, and was therefore not authorized by law, or in accordance with the advertisement.

The doctrine of the case of Trowbridge v. City of

New York, 53 N. Y. Supp. 616, is applicable, and, while rigid, in an accurate construction of power in a case like this. There the question presented was the right of the city of New York to accept a bid for corporate stock, the bidder adding to the bid these words: "Our bid is subject to the approval of the validity of the issues by our counsel." It is true, the facts of that case were different from those in the present suit, but the discussion of the court is pertinent in the view that in making the bid subject to the approval of the validity of the issue by counsel, an express agreement was made, whereby the approval of the bidder's counsel was required to be secured, before the bidder was compelled to take the bonds. The court said that the language used by the bidder was clear, and that the counsel of the bidder was made the arbitrator under the contract, and that by such a provision, there was secured to the bidder, who made it, an advantage over unconditional and lower bidders. Judge Cohen, speaking for the court said:

> "The whole controversy turns upon the meaning in law of the words, 'our bid is subject to the approval of the validity of the issues by our counsel.' Do they import a condition or term into the plaintiff's bid other than that which the law would imply if no such language had been used? If so, the act of the comptroller was lawful. It is well settled that by implication, the law demands that the vendor must tender a valid issue of stock, and

that, if he does not, the purchaser has the right to reject it. But where no qualifying language is used, the question of validity is to be determined by the courts. Of course, this would be done only after a bidder has rejected the stock because of defective title. But here, by express agreement, the approval of the bidder's counsel must be secured before they shall be compelled to take. The plaintiffs contend that this distinction is shadowy and not real, because, in any event, the court must finally determine the validity of the stock,—in other words, plaintiffs insist that persons of full age and competent understanding may use words the natural import and meaning of which is to make a condition, without any effect. On the contrary, the law is that such persons shall be given he fullest liberty to make contracts in any terms they may adopt, and the court will do its utmost to sustain the intent of the contracting parties. If anything could be said to make it clearer than the language itself does that these words do effect a change of substance, let us assume that, after the plaintiffs made their bids, their counsel had disapproved of the validity of the issues, and that thereupon a return of the deposit of $250,000 and upwards had been demanded of the comptroller and refused. In order to recover back that sum, the plaintiffs would have instituted an action, in which they would have been compelled to prove the advertisement of the comptroller, the proposal of the bidders, the deposit of the amount named, the disapproval of their counsel, and the refusal of the comptroller to pay back. Would any court have thereupon dismissed the plaintiffs' complaint, and

sent them out of court? Surely not; but this it certainly would have done if the defendant the Produce Exchange Trust Company, under its proposal had only proved as much. If the lower bidder had refused to accept the bonds, and it in turn had asked back the deposit, it would have been incumbent upon the Produce Exchange Trust Company not only to have proved the advertisement, proposal and deposit, but to have shown the failure of title on the part of the city. Thus it will be seen that there is a real and substantial difference between these two bids; the plaintiffs having far less to prove under their offer than the defendant trust company under its proposal, and the city, in its turn, having far more to prove in the one case than in the other. As has been said, the court might under either proposal become the final arbitrator, but the counsel of the plaintiffs, under the higher bid, would have been the arbitrator,—the recognized judge,—under the contract, for the time being and thus to these plaintiffs would have been secured an advantage over the unconditional and lower bidder. Not to hold that such a bid is conditional would be equivalent to maintaining that a contracting party must not be taken to mean what he says. and that the law will override his very words and his obvious meaning.''

It is likewise pointed out by the court that during the period of the notice of sale, persons contemplating bidding for bonds have opportunity to examine the public statutes, ordinances, resolutions and records, under which the bonds are issued, and thus to obtain beforehand information of the validity of the issue.

In the light of the statutes of Montana, and under the advertisements of sale in this matter, I can find no authority for the city of Helena to enter into an agreement allowing a bidder to impose a condition, such as was here stated, which must happen before the bidder becomes bound by the contract. When the city advertised the sale of its bonds to the highest bidder for cash, the only legal bid it could receive was an unconditional one. An agreement for sale, as contra-distinguished from a sale, will not do. Of course, considering the character of the property sold, a brief period would be expected between the time when an auctioneer has sold municipal bonds to the highest bidder, and the delivery of such bonds to the successful bidder; but as I read the statutes (where the question is raised before delivery of the bonds), it must be held that there can be no qualifications or restrictions attached to a bid which makes the payment by the bidder conditional upon advice to him by his counsel that the bond issue is a valid and binding obligation. It does not meet the present case to say that there was no other bidder except one, and that he attached a like condition to his bid, for aside from the suggestion that it is impossible to say how many bidders there might have been, if it had been known that the city would depart from the advertisement and from the law by permitting bidders to make their offers conditional upon the approval of the bonds by counsel, there is the vital objection that a

city, being limited in the exercise of its authority, can not sell its bonds in any manner other than as the law prescribes it shall sell them.

The Haytain Republic, 64 Fed. 215.

Camden v. Mayhew, 129 U. S. 73.

There is no conflict between what I have said and the opinion of Judge Hawley in City of Great Falls v. Theis, 79 Fed. 943.

Another material departure from the statute is that the interest on the bonds is to be paid upon October first and April first, instead of upon January first and July first, as required by the terms of section 3459 of the Revised Codes. This point would also doubtless be entitled to slight consideration if the bonds had passed into the hands of third persons who had bought in good faith, but, inasmuch as it is presented in a proceeding for injunction instituted before delivery of the bonds at all to any purchaser, the court should enjoin the city authorities upon the ground that they are departing from the letter of their authority, as found in section 3459 of the Revised Codes.

Aylmore v. City of Seattle, 92 Pac. 932.

Erskine v. Steele County, 28 L. R. A. 644.

It was an irregularity on the part of the city to enter into a contract with the American Light & Water

Company without requiring of that company a bond with at least two sureties conditioned for the faithful performance of the contract, as manifestly contemplated by the ordinance of the city and the laws of the state, prescribing that foreign surety companies should comply with the provisions of the statutes of the state before doing business therein, and that, unless they do, all bonds and undertakings entered into by any citizen or resident of the state with any such organization as surety shall be void. But I am not prepared to say that were this the basis of complainant's bill, it would justify injunction.

As temporary injunction must issue, because of reasons already given, I express no opinion at this time upon the other questions raised with respect to the bonds, including the very important question whether the city can issue valid bonds at all until the proper courts have directly decided that it has authority to acquire the right to the use of the waters of McClellan creek, as of superior public need. That a city may generally condemn a water right has been decided by the court of the state in Helena v. Rogan, 26 Mont. 452, but whether the water of McClellan creek that has already been appropriated by ranchmen can be taken by the city upon the ground that the proposed use of the city is a more necessary public use seems to be an open question.

Complainant is requested to draw an order.

No. 1705

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MONTANA COAL & COKE COMPANY (A CORPORATION),

Plaintiff in Error,

vs.

ANDREW KOVEC,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

Messrs. CARPENTER, DAY & CARPENTER, Helena, Montana, and O. M. HARVEY, Esq., Livingston, Montana,

Attorneys for Plaintiff in Error.

Messrs. WALSH & NOLAN, Helena, Montana, and Messrs. MILLER & O'CONNOR, Livingston, Montana,

Attorneys for Defendant in Error.

[Recital Relative to Filing of Transcript on Removal.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 884.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL AND COKE COMPANY (a Corporation),

Defendant.

Be it remembered, that on the 29th day of September, 1908, a Transcript of Removal of the above-entitled cause from the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park, was filed herein, being in the words and figures following, to wit:

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation), and LOUIS TESTOVARSNICK,

Defendants.

Complaint.

Comes now the plaintiff and complains and alleges:

I.

That the defendant, Montana Coal & Coke Company, is now, and during all of the time hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and the owner of, and engaged in the operation of certain coal mines and machinery, appliances and engines used in connection therewith, at or near the Town of Aldridge, Park County, Montana.

II.

That prior to the 23d day of September, 1907, the plaintiff was in the employ of the defendant, Montana Coal & Coke Company, as a common miner in the mines of said company at Aldridge, Montana; that likewise the defendant Louis Testovarsnick, was at said time employed by the defendant, Montana Coal & Coke Company, as foreman or shift boss, and

that he had charge of and supervision over certain of the men employed in said mines by the said defendant, Montana Coal & Coke Company, among which men that the said defendant, Louis Testovarsnick, had supervision over was this plaintiff.

III.

Plaintiff alleges that on or about the 23d day of September, 1907, and while this plaintiff was employed as aforesaid as a common miner, the defendants instructed and directed this plaintiff to take charge of, and operate a certain hoisting electric engine which was used in the operation of said mines by the said defendant, the Montana Coal & Coke Company. That the plaintiff expressed a doubt as to his ability to operate said engine, as he was no engineer, and knew absolutely nothing about the mechanism of an engine, and objected to taking charge of said engine, but was assured by the defendants that he was qualified to take charge of this work, and was persuaded by said defendants to proceed to operate the said engine belonging to said company as aforesaid, and did operate said engine up to the time of the accident hereinafter referred to.

IV.

That the defendants instructed this plaintiff to take charge of said hoisting engine as aforesaid, with full knowledge that the plaintiff was ignorant and had no experience in the operation of such an engine, and was no engineer, and knew that the running of said engine was dangerous and knew that the plaintiff did not know anything about the dangers attending the operation of said engine, and that the said de-

fendants did not in any way instruct the plaintiff how to manage or operate said engine, and did not advise or warn the plaintiff of the dangers attendant to the operation of such an engine, but merely compelled him to take charge of, and run said engine.

V.

That the said defendants, Montana Coal & Coke Company and Louis Testovarsnick, were negligent in directing and compelling this plaintiff to operate said engine without first having fully instructed him as to the mechanism of the said engine, and as to how the same was operated, and that they were negligent in not warning the plaintiff of the dangers to an inexperienced man running such an engine, and that it became and was the duty under the circumstances herein set forth, and in the exercise of due care on the part of said defendants towards this plaintiff to fully instruct the plaintiff as to how the said engine was managed, and should have warned the plaintiff as to the dangers attendant to the handling and operation of such an engine, but that the said defendants utterly disregarding their duty toward the plaintiff, failed to instruct the plaintiff as to how the said engine was run and failed to warn the plaintiff against the dangers of running such an engine.

VI.

That while the plaintiff was employed as aforesaid and while this plaintiff was operating said hoisting engine as aforesaid, and in the course of his duties, on the said 23d day of September, 1907, he was ordered to stop and shut off the power of said hoisting engine and while the plaintiff was attempting to stop said en-

gine he was obliged to place his foot on the brake of said engine, and that when attempting to so place his foot on the brake, the brake began to vibrate very violently, and by reason of such vibration of said brake, this plaintiff, in so attempting to place his foot on said brake was thrown against and into the gearing portion of said engine, and by means of such fall, plaintiff's right hand was caught in the gearing portion of said engine and was taken off at the wrist, and that this plaintiff suffered other physical injuries.

VII.

Plaintiff further alleges that there were no guards or any protection whatever surrounding the gearing portion of said engine, and that the said gearing portion was left exposed by reason thereof. That the defendant, Montana Coal & Coke Company, in the exerice of due care and diligence could have known, and in fact did know that there were no guards or protection whatever surrounding the gearing portion of said engine, and that the same was exposed as aforesaid, and that it was the duty of the said defendant, Montana Coal & Coke Company, in the exercise of due care and diligence on its part toward its employees, to have the gearing portion of said engine protected by means of guards or otherwise, in order that accidents of this character would be avoided, but that the said defendant, Montana Coal & Coke Company utterly disregarding its duty in respect to having said gearing portion of said engine protected as aforesaid, left the said gearing portion fully exposed and unprotected.

VIII.

That by reason of the negligence of the defendants in ordering and compelling this plaintiff to operate said engine with full knowledge that the plaintiff was not conversant with the mechanism and handling and the operation of said hoisting engine, and knowing the dangers attendant to the operation of an engine by an inexperienced man, and not having advised the plaintiff as to the dangers incident to the operation of said engine, and not having instructed the plaintiff how to operate, manage and control the said engine, and by reason of the negligence of the defendant, Montana Coal & Coke Company, in not having the gearing portion of said engine properly guarded and protected and by reason of its having left the gearing portion of said engine unguarded and unprotected, this plaintiff had his right hand taken off at the wrist, and suffered severe pain, and other physical damage, and has since, and is now, and will always remain unable to do any physical labor. That the plaintiff was of the age of twenty-nine years and capable of earning One Hundred Ten Dollars ($110.-00) per month, and did earn on an average of One Hundred and Ten Dollars ($110.00) per month, but that by reason of said injuries, plaintiff's earning capacity has been permanently and almost totally disabled. That by reason of the premises, the plaintiff has been dameged in the sum of Thirty Thousand Dollars ($30,000).

Wherefore, plaintiff demands judgment against the said defendants for the sum of Thirty Thousand Dollars ($30,000), and his costs incurred herein.

MILLER & O'CONNOR,
Attorneys for Plaintiff.

State of Montana,
County of Park,—ss.

Andrew Kovec, being first duly sworn, on oath deposes and says: that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true.

ANDREW KOVEC.

Subscribed and sworn to before me this 21st day of May, 1908.

[Seal] JAMES F. O'CONNOR,
Notary Public, Park County, Montana.

No. 2802. State of Montana, County of Park. In District Court, Sixth Judicial District. Andrew Kovec, Plaintiff, vs. Montana Coal & Coke Company et al., Defendants. Complaint. Filed May 23d, 1908. Arthur Davis, Clerk. By W. H. Pethybridge, Deputy Clerk. Miller & O'Connor, Attorneys for Plaintiff.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL AND COKE COMPANY (a Corporation), and LOUIS TESTOVARSNICK,

Defendants.

Summons.

The State of Montana Sends Greeting to the Above-named Defendants:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said court this 23d day of May, 1908.

[Seal] ARTHUR DAVIS,

Clerk.

State of Montana,
County of Park,—ss.
Office of the Sheriff.

I hereby certify that I received the annexed summons on the 23d day of May, 1908, and personally served the same on the 25th day of May, 1908, on the Montana Coal and Coke Company, by delivering to and leaving with Edmond A. Bartel, General Manager of said Company, a true and correct copy of said summons and complaint, and also by delivering to and leaving with Louis Testovarsnick a true and correct copy of said summons, in the county of Park, State of Montana.

Dated this 27th day of May, A. D. 1908.

HARRY McCUE,
Sheriff.
By George Van Fleet,
Deputy Sheriff.

Service on 2	$ 2.00
Mileage	10.60
	$12.60

No. 2802. In District Court, Sixth Judicial District, Park County, Montana. Andrew Kovec, Plaintiff, against Montana Coal and Coke Company et al., Defendants. Summons. Filed May 27th, 1908. Arthur Davis, Clerk. Miller & O'Connor, Attorneys for Plaintiff.

SHERIFF'S RECEIPT.

Received the within summons this 23d day of May, 1908, at 10:30 o'clock A. M.

HARRY McCUE,
Sheriff.
By George Van Fleet,
Deputy Sheriff.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,
Plaintiff,
vs.
MONTANA COAL AND COKE COMPANY (a Corporation), and LOUIS TESTOVARSNICK,
Defendants.

Demurrer of the Defendant Louis Testovarsnick.

Comes now the defendant, Louis Testovarsnick, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff on file herein, and for cause of demurrer alleges: that the said complaint does not state facts sufficient to constitute a cause of action against this defendant.

O. M. HARVEY, and
CARPENTER, DAY & CARPENTER,
Attorneys for the Defendant, Louis Testovarsnick.

No. 2802. In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park. Andrew Kovec, Plaintiff,

vs. Montana Coal and Coke Company, a Corporation, et al., Defendants. Demurrer of Defendant Louis Testovarsnick. Filed June 10, 1908. Arthur Davis, Clerk.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation), and LOUIS TESTOVARSNICK,

Defendants.

Demurrer of the Montana Coal & Coke Company.

Comes now the defendant the Montana Coal & Coke Company, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff on file herein, and for cause of demurrer alleges; that the said complaint does not state facts sufficient to constitute a cause of action against this defendant.

O. M. HARVEY and
CARPENTER, DAY & CARPENTER,
Attorneys for Defendant the Montana Coal & Coke Company.

[Endorsed]: Title of Court and Cause. Demurrer of the Montana Coal and Coke Company. Filed June 10, 1908. Arthur Davis, Clerk.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

THE MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Petition for Removal.

The petition of the Montana Coal & Coke Company, a corporation, the defendant in the above-entitled action respectfully shows:

1. That the said action is a suit of a civil nature at common law, of which the Circuit Court of the United States has original jurisdiction, and has been brought and is now pending in this Honorable Court, and has not yet been tried, nor has the time at or before which the defendant, this petitioner, is required by the laws of the State of Montana, or any rules or rule of this Honorable Court to answer or plead to the complaint of the plaintiff elapsed.

That the matter in dispute in said suit exceeds, exclusive of interest and costs the sum and value of two thousand dollars, and said suit is a controversy between the plaintiff, who at the time of the commencement of said suit was, and now is a citizen of the State of Montana, and this defendant who is not a citizen of the State of Montana, but was at the commencement of said suit, and now is a corporation

organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of said state.

That at the commencement of said action, one Louis Testovarsnick, a citizen of the State of Montana, was made a party defendant with this defendant, but that on the 30th day of June, 1908, the said District Court sustained a demurrer to the complaint of the plaintiff on behalf of the said defendant Louis Testovarsnick, and thereby held that the said Louis Testovarsnick was not a proper party to the said action, and that the said complaint did not state a cause of action as to him; and on July 2d, 1908, the plaintiff in said action declined to plead further as to the said Louis Testovarsnick, and that there are no other parties to the said action except this defendant.

2. That by reason of the premises this petitioner, the said defendant, desires and is entitled to have said suit removed from said District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park, into the Circuit Court of the United States for the proper district at this time.

3. That the Circuit Court of the United States for the Ninth Circuit, in and for the District of Montana, holding terms at the City of Helena, is the Circuit Court of the United States for the proper district, being the Circuit Court of the United States held in the District where said suit is pending.

4. That your petitioner herewith presents a good and sufficient bond as provided by the statute in

such cases that it will on or before the first day of the next ensuing session of the Circuit Court of the United States for the Ninth Circuit in and for the District of Montana, file therein a transcript of the record of this action and for the payment of all costs which may be awarded by said court, if the said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this Court proceed no further herein except to make the order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law, and as in duty bound, your petitioner will ever pray.

THE MONTANA COAL & COKE COMPANY,

By O. M. HARVEY and
CARPENTER, DAY &
CARPENTER,

Its Attorneys.

State of Montana,
County of Park,—ss.

Edmund A. Bartel, being first duly sworn, deposes and says: I am an officer of the defendant corporation, the petitioner named in the foregoing petition, to wit: Its general manager; I have read the said petition and know the contents thereof, and the same is true of my own knowledge, except as to such matters as are therein stated on information and

belief, and as to such statements I believe it to be true.

EDMUND A. BARTEL.

Subscribed and sworn to before me this 29th day of July, 1908.

[Seal] J. W. HULSE,

Notary Public in and for said County and State.

Commission expires Jan. 21, 1910.

Service of the foregoing accepted and copy received this 31st day of July, 1908.

MILLER & O'CONNOR,
Attorneys for Plaintiff.

[Endorsed]: Title of Court and Cause. Petition for Removal. Filed July 31, 1908. Arthur Davis, Clerk.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL AND COKE COMPANY (a Corporation),

Defendant.

Bond on Removal.

Know All Men by These Presents: That we, the undersigned, the Montana Coal and Coke Company, a corporation, as principal, and the National Surety Company, a corporation organized and existing un-

der the laws of the State of New York for the purpose of becoming surety upon bonds, obligations and undertakings required by law, and authorized to engage in such business and become such surety in the State of Montana, as surety, are held and firmly bound unto Andrew Kovec, the plaintiff in the above-entitled cause, his heirs, administrators and assigns, in the sum of Five Thousand Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, jointly and severally by these presents.

The condition of this obligation is such that,

Whereas, the said Montana Coal and Coke Company has applied by petition to the District Court of the Sixth Judicial District of the State of Montana, in and for the county of Park, for the removal of a certain cause therein pending, wherein the said Andrew Kovec is plaintiff, and the said Montana Coal and Coke Company is defendant, to the Circuit Court of the United States, for the Ninth Circuit, District of Montana, for further proceedings on grounds in such petition set forth, and that all further proceedings in said action in said District Court be stayed.

Now, therefore, if your petitioner, the said Montana Coal and Coke Company, shall enter in said Circuit Court of the United States for the District of Montana aforesaid, on or before the 1st day of the next regular session, a copy of the records in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court

of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

In witness whereof, we have caused these presents to be signed in our corporate names and our corporate seals to be thereunto fixed this 28th day of July, 1908.

THE MONTANA COAL & COKE CO.,
By CARPENTER, DAY & CARPENTER,
Its Attorneys.

NATIONAL SURETY CO. OF NEW YORK,
By ROBERT A. FRASER,
[Seal] By A. B. HOLTER,
Attorneys in Fact.

[Endorsed]: Title of Court and Cause. Bond on Removal. Filed July 31st, 1908. Arthur Davis, Clerk.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,
Plaintiff,

vs.

THE MONTANA COAL & COKE COMPANY (a Corporation),
Defendant.

Notice of Motion for Order of Removal.

To Messrs. Miller and O'Connor, Attorneys for Plaintiff:

You will please take notice, that the defendant in the above-entitled action will, on Tuesday, the first day of September, 1908, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the Court for an order removing said cause to the Circuit Court of the United States for the District of Montana, Ninth Circuit, in accordance with the petition of said defendant, a copy of which is served herewith.

Dated the 31st day of July, 1908.

CARPENTER, DAY & CARPENTER, and
O. M. HARVEY,
Attorneys for Defendant.

Service of foregoing accepted and copy received this 31st day of July, 1908.

MILLER & O'CONNOR,
Attorneys for Plaintiff.

[Endorsed]: Title of Court and Cause. Notice of Motion for Order of Removal. Filed July 31, 1908. Arthur Davis, Clerk.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY,

Defendant.

Answer.

I.

Comes now the defendant in the above-entitled action, and for answer to the complaint of the plaintiff on file herein:

1. Admits the allegations of paragraph 1 of the said complaint.

2. Admits that on the 23d day of September, 1907, the plaintiff was in the employ of this company at its mines at Aldridge, Montana, and that on said date the plaintiff was injured while operating a certain hoisting electric engine which was used by this defendant company in the operation of its said mines.

3. Denies each and every allegation in the plaintiff's complaint contained not hereinabove specifically admitted.

II.

For another and further answer to the said complaint, and for a separate defense thereto defendant alleges:

1. That on the said 23d day of September, 1907, the plaintiff was engaged in hoisting coal by means

of the certain hoisting electric engine described in the complaint herein. That at that time the plaintiff was a person of ordinary intelligence and good understanding and perfectly familiar with the operation of the said certain hoisting electric engine, and had frequently used the said engine in hoisting coal in the mines of the said defendant company, and was fully advised as to the operation of the brake attached to the said engine, and of the fact that the gearing portion of the said engine was left exposed. That the said electric hoisting engine was in good condition and perfectly safe for operation by persons using ordinary care. That if there were any faults or defects in the construction of the said engine by reason of the gearing portion thereof being left exposed, or any possible danger in the use of the said engine by reason thereof, the defects or defaults in construction and danger in operation were obvious and well known and appreciated by the said plaintiff at the time of the said accident, and that the said plaintiff in entering upon and continuing in the employment of this defendant company after he had been directed to take charge of the hoisting of coal by means of said engine, assumed any and all risks of personal injuries by reason of the operation of the said engine with its gearing portion exposed.

III.

For another and further answer to the said complaint, and for a separate defense thereto defendant alleges:

That on or about the 23d day of September, 1907, the said hoisting electric engine in use in the opera-

tion of the said mines of this defendant company as alleged in the complaint, was in a perfectly safe condition for use, and that the machinery connected with the said engine was amply protected and enclosed and perfectly safe to an operator of the said engine using ordinary care. That the plaintiff Andrew Kovec had prior to the said 23d day of September, 1907, frequently used the said hoisting electric engine in the hoisting of coal in the said defendant company's mines and was fully instructed and advised as to the care and caution to be exercised by him in the operation and use of the said hoisting electric engine, and the brakes and machinery connected therewith. That if the plaintiff was thrown into the said gearing by reason of the vibration of the brake attached to the said engine upon which he had placed his foot, that he was so thrown by reason of the carelessness and negligent manner in which he placed his foot upon the brake of the said engine, and that his negligence in so placing his foot upon the said brake contributed to and was the direct and approximate cause of the injuries sustained by him at that time.

Wherefore, the defendant company having fully answered, prays that the said action be dismissed and that it recover of the plaintiff its costs herein incurred.

O. M. HARVEY and
CARPENTER, DAY & CARPENTER.

State of Montana,
County of Lewis & Clark,—ss.

E. C. Day, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant the Montana Coal & Coke Company in the above-entitled action; that the defendant is a corporation, and all of its officers are absent from the county of Lewis & Clark where this affiant resides at the time this verification is being made, for which reason the verification is made by this affiant. That he has heard read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

E. C. DAY,

Subscribed and sworn to before me this 28th day of July, A. D. 1908.

[Seal] STEPHEN CARPENTER,
Notary Public in and for said County and State.

Service of the foregoing accepted and copy received this 31st day of July, 1908.

MILLER & O'CONNOR,
Attorneys for Plff.

[Endorsed]: Title of Court and Cause. Answer. Filed July 31, 1908. Arthur Davis, Clerk. By W. H. Pethybridge, Deputy.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL AND COKE COMPANY (a Corporation),

Defendant.

Reply.

Comes now the plaintiff, and for reply to defendant's answer herein on file, admits, denies and alleges:

I.

That as to paragraph numbered one of defendant's separate defense, plaintiff admits that on the 23d day of September, 1907, as stated in his complaint, he was engaged in the operation of a certain hoisting electric engine described in said complaint, but denies that he understood how to use or was familiar with the operation of said electric engine, and denies that he frequently, or otherwise, used the said engine in said mines of the said defendant company, and denies that he was fully, or otherwise, advised as to the operation of said engine and the brake thereof, and alleges that he did not know what the result would be when he so placed his foot upon the said brake as stated in his complaint; denies that the said electric hoisting engine was in good condition,

and denies that it was safe for operation by persons using ordinary care; denies that the defects and defaults in the construction of the said engine in its operation was obvious, and denies that it was known by the plaintiff at the time of the accident, or at any other time, and denies that the plaintiff assumed any risk incident to the operation of said engine by reason of the defects and defaults of the said engine under the circumstances as alleged in his complaint.

II.

That as to defendant's second separate defense, this plaintiff denies each and every allegation contained therein, and generally denies each and every allegation contained in defendant's answer not herein specifically admitted.

Wherefore, plaintiff having fully replied to defendant's answer herein on file, demands judgment as prayed for in his complaint.

MILLER & O'CONNOR,
Attorneys for Plaintiff.

State of Montana,
County of Park,—ss.

Andrew Kovec, being first duly sworn, on oath says: That he is the plaintiff in the above-entitled action, that he has heard read the foregoing reply and knows the contents thereof, and that the same is true.

ANDREW KOVEC.

Subscribed and sworn to before me this 14th day of August, 1908.

JAMES F. O'CONNOR,
Notary Public, Park County, Montana.

[Endorsed]: Title of Court and Cause. Reply. Filed August 17, 1908. Arthur Davis, Clerk. By W. H. Pethybridge, Deputy Clerk.

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

ANDREW KOVEC,

Plaintiff,

vs.

THE MONTANA COAL AND COKE COMPANY (a Corporation),

Defendant.

Order of Removal.

This cause coming on for hearing upon application of the defendant herein for an order transferring this cause to the Circuit Court of the United States for the Ninth Circuit, District of Montana, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law, and it appearing to the Court that this is a proper cause for removal to said Circuit Court:

Now, therefore, it is hereby ordered and adjudged that this cause be and it hereby is removed to the Circuit Court of the United States for the Ninth Circuit, District of Montana, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith, and all further

proceedings in the said cause herein are hereby stayed.

Done in open court this 1st day of Sept., 1908.

FRANK HENRY,

Judge.

[Endorsed]: Title of Court and Cause. Order of Removal. Filed Sept. 1, 1908. Arthur Davis, Clerk.

[Minutes of District Court—June 16, 1908.]

In the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park.

At a regular term of the District Court of the Sixth Judicial District of the State of Montana, sitting in and for the County of Park, began and held at the courthouse in Livingston, the county seat of said county of Park, on the 16th day of June, A. D. 1908. Sixth Day of Term. Present: Hon. FRANK HENRY, as sole Judge thereof; O. M. Harvey, Counsel for Defendant, and Miller & O'Connor, Counsel for Plaintiff, and Arthur Davis, Clerk of said District Court.

The following proceedings, among others, were had, to wit:

2802.

ANDREW KOVEC,

vs.

MONTANA COAL AND COKE CO. et al.

Demurrer argued, submitted to the Court and taken under advisement.

[Minutes of District Court—Tuesday, June 30th.]

Tuesday, June 30th—Twelfth Day of Term.

[Title and Cause.]

Demurrer of defendant Louis Testovarsnick sustained and demurrer of defendant Montana Coal & Coke Company overruled.

[Minutes of District Court—Thursday, July 2, 1908.]

[Title and Cause.]

Thursday, July 2, 1908—Thirteenth Day of Term.

Plaintiff waives all rights to further plead as to defendant Louis Testovarsnick, and defendant Montana Coal & Coke Company given thirty days from this date in which to file answer.

[Minutes of District Court—Tuesday, September 1, 1908.]

Tuesday, September 1, 1908—First Day of Term.

[Title and Cause.]

Coming on to be heard upon the application of the defendant for an order transferring this cause to the Circuit Court of the United States, for the Ninth Circuit, District of Montana, and due proof being made to the satisfaction of the Court, it is ordered that this cause be removed to the Circuit Court of the United States for the Ninth Circuit, District of Montana, and that the Clerk make up the record in said cause for transmission to said court forthwith, and all further proceedings herein are hereby stated.

Order signed and filed.

[Certificate of Clerk to Transcript of Record on Removal.]

State of Montana,
County of Park,—ss.

I, Arthur Davis, Clerk of the District Court of the Sixth Judicial District of the State of Montana, in and for the County of Park, do hereby certify and declare that the foregoing transcript, consisting of 39 pages, numbered from 1 to 39, both inclusive, constitutes a full, true and correct copy and transcript of the record of the case of Andrew Kovec, plaintiff, vs. The Montana Coal and Coke Company and Louis Testovarsnick, defendants, known as case No. 2802, upon the calendar of said court, the same consisting of a true copy of the plaintiff's complaint with the indorsement thereon; a true copy of the summons issued with the indorsement thereon; true copies of the demurrers with the indorsements thereon; of the defendants, Louis Testovarsnick and the Montana Coal and Coke Company, to the plaintiff's complaint; a true copy with the indorsements thereon of the petition for removal of the defendant Montana Coal and Coke Co.; a true copy with the indorsements thereon of the bond for removal; a true copy with the indorsements thereon of the notice of motion for order of removal; a true copy with the indorsements thereon of the answer of the defendant the Montana Coal and Coke Company; a true copy with the indorsements thereon of the reply of the said plaintiff; a true copy with the indorsements thereon of the order of re-

moval to the Circuit Court of the United States, for the Ninth Circuit, District of Montana; a true copy of all the minute entries in the Register of Actions in said cases; and a true copy of all entries in court proceedings in said case.

In witness whereof, I have hereunto set my hand and affixed the seal of this court at Livingston, Montana, this 9th day of September, A. D. 1908.

[Seal] ARTHUR DAVIS,
Clerk District Court Park County, Montana.
By W. H. Pethybridge,
Deputy Clerk.

[Endorsed]: No. 884. Title of Court and Cause. Transcript on Removal. Filed September 29th, 1908. Geo. W. Sproule, Clerk.

And thereafter, upon the trial of said cause, to wit, on the 9th day of January, 1909, the verdict of the jury as rendered was duly filed and entered herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 884.

ANDREW KOVEC,
Plaintiff,

vs.

THE MONTANA COAL AND COKE COMPANY (a Corporation),
Defendant.

Verdict.

We, the jury in the above-entitled cause, find in favor of the plaintiff, and assess his damages in the sum of Five Thousand ($5,000.00) Dollars.

Dated January 9th, 1909.

E. N. BRANDEGEE,
Foreman.

[Endorsed]: Title of Court and Cause. Verdict. Filed and Entered Jan. 9, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 11th day of January, 1909, judgment was duly rendered and entered herein, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,
Plaintiff,

vs.

THE MONTANA COAL AND COKE COMPANY (a Corporation),
Defendant.

Judgment.

This cause came on regularly for trial on the 6th day of January, 1909, Messrs. Walsh & Nolan, and Miller & O'Connor, appearing as counsel for plaintiff, and Messrs. Carpenter, Day & Carpenter, as counsel for defendant. A jury of twelve persons was regularly impaneled and sworn to try said cause, where-

upon witnesses on the part of the plaintiff and on the part of the defendant were duly sworn and examined. After hearing the evidence, the arguments of the counsel and the instructions of the Court, the jury retired to consider their verdict and subsequently returned into court, and being called answered to their names, and say they find a verdict for the plaintiff and against the defendant and assess the plaintiff's damages at Five Thousand Dollars ($5,000.00).

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff do have and recover of and from said defendant the sum of Five Thousand Dollars ($5,000.00), with interest thereon at the rate of eight (8%) per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, taxed at $199.30.

Judgment entered this 11th day of January, 1909.

GEO. W. SPROULE,
Clerk.

Attest a true copy of judgment.

[Seal] GEO. W. SPROULE,
Clerk.

Certificate of Clerk to Judgment-roll.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 12th day of January, A. D. 1909.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

[Endorsed]: Title of Court and Cause. Judgment-roll. Filed January 12, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 13th day of March, 1909, defendant's Bill of Exceptions was duly signed, settled, allowed and filed, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 884.

ANDREW KOVEC,
Plaintiff,
vs.
MONTANA COAL & COKE COMPANY (a Corporation),
Defendant.

Bill of Exceptions.

Be it remembered, that in the above-entitled action, Andrew Kovec, plaintiff, brought this suit against Montana Coal & Coke Company, a corporation, defendant, for the purpose of recovering damages for injuries alleged to have been sustained by

him in the operation of a hoisting engine, while employed by the defendant in its coal mines at Aldridge, Montana.

Upon the issues raised by the answer of the defendant, and the reply of the plaintiff thereto, beginning on Wednesday, the sixth day of January, 1909, the case was tried before the Court and a jury of twelve persons impaneled and sworn to try the issues in said cause, the plaintiff appearing by himself and by C. B. Nolan, Esquire, and James F. O'Connor, Esquire, his attorneys, and the defendant appearing by E. C. Day, Esquire, and O. M. Harvey, Esq., its attorneys.

Whereupon the following proceedings were had and done, the rulings of the Court hereinafter set forth were made, and the exceptions of the defendant thereto noted.

[Testimony of Andrew Kovec, for Plaintiff.]

Wednesday, January 6, 1909, A. M.

ANDREW KOVEC, the plaintiff herein, called and sworn as a witness, testified as follows:

Direct Examination.

(By Mr. O'CONNOR.)

Q. You may state your name, please. Give us your full name, Andrew. Tell us what your full name is. A. Andrew Kovec.

Q. Where do you live, Andrew?

A. I live up at Aldridge.

Q. In Park county, Montana?

A. Yes, sir.

Q. How long have you lived there?

(Testimony of Andrew Kovec.)

A. I have lived there about ten years.

Q. For ten years?

A. Something like that; yes.

Q. How long have you worked for the Montana Coal & Coke Company?

A. Since I came there.

Q. How many years have you worked for the Montana Coal & Coke Company?

A. I couldn't say exactly how many years, but I was working pretty near all the time, as long as I was there.

Q. You worked for the Montana Coal & Coke Company since you went to Aldridge, and you say you went there about ten years ago?

A. Yes, sir.

Q. What is your age, Mr. Kovec? How old are you?

A. I was twenty-nine years old when I was hurt. I am thirty now.

Q. You are thirty now? A. Thirty now.

Q. What did you do while working for the Montana Coal and Coke Company? A. Dug coal.

Q. You dug coal? A. Yes.

Q. Explain to the jury what you mean by that, Mr. Kovec. That is, explain to the jury what you did in digging coal.

A. I don't understand.

Q. Did you use any kind of machinery in digging the coal? A. No.

Q. What did you use,—a sort of a pick or shovel, or something? A. A pick and shovel.

(Testimony of Andrew Kovec.)

Q. A pick and shovel? A. Yes, sir.

Q. Are those the only pieces of machinery that you worked with during the time that you were working for the Montana Coal and Coke Company up to the time you were injured?

A. I don't understand that.

Q. I say, did you use any other kind of a piece of machinery while working for the coal company besides a pick and shovel? A. No.

Q. Did you ever have any experience with any kind of machinery outside of a pick and shovel?

A. No, sir.

Q. Did you ever operate any kind of a piece of machinery? A. No, I didn't.

Q. Then you used nothing but a pick and shovel while working for the company at Aldrich?

A. No.

Q. Now, who is Louis Testovarsnik? What position, if any, did he hold for the company?

A. He was mine foreman.

Q. He was mine foreman? A. Yes.

Q. Were you subject to his instructions during the time you were in the employ of the defendant company? That is, did he tell you what to do?

A. Yes.

Q. During all of that ten years' time?

A. No; he didn't during all of those ten years.

Q. You may state whether or not you were subject to his orders at the time of the accident, on the 23d of September, 1907? A. Yes.

Q. He at that time told you what to do?

(Testimony of Andrew Kovec.)

A. Yes. He told me to get in sometimes and pull the cars up when the driver wasn't there.

Q. He was mine foreman on this particular day, the 23d day of September, 1907? A. Yes.

Q. You say he told you to pull the cars up when the driver was absent? A. Yes.

Q. How were you to pull the cars up?

A. What is that?

Q. How were you to pull them out of the mine up to the surface, or up to the main line?

A. Pull them with an engine.

Q. You pull them with an engine? A. Yes.

Q. What kind of an engine?

A. I don't know exactly what kind of an engine it was.

Q. He told you to take the cars out of the mine—

By Mr. DAY.—(Interrupting.) I submit that this is leading the witness

The COURT.—Avoid that. You are now reaching a very important feature of the case.

By Mr. O'CONNOR.—I will withdraw the question.

Q. What did Mr. Testovarsnik tell you to do upon the morning of the 23d of September, 1907?

A. He told me to get on the engine and pull those cars up, and down, so that we could get more cars when the driver didn't have the time.

Q. By what means were you to pull those cars out? That is, what were you to use to pull the cars out? A. The engine.

(Testimony of Andrew Kovec.)

Q. Did you obey his orders? That is, did you start in to carry out Testovarsnik's orders to you?

A. Yes.

Q. What did you do? Just tell us what you did that morning in regard to running the engine.

A. What I did?

Q. What you did; yes.

A. I just went in there in my place, and I was working there, and when the driver come in I went up. When the driver went inside, I went up to pull the car up.

Q. You went to pull the car up? A. Yes.

Q. What did you do when you attempted to pull the car up?

A. Well, when I pulled the car up, I tried to stop the brake.

Q. What did you do when you first started to pull the car up? What did you take hold of, if anything? A. I took hold of the hoist.

Q. What were you working with when you took hold? Were you working with the electric engine?

A. Yes; I was working with the electric engine.

Q. Tell us what you did. What did you take hold of?

A. I took hold with one hand, kind of that way (illustrating), so that I could work the hoisting engine. With this hand, I took hold of that, so as to run the cars up and down. I turned that loose when the car got up, and when the car come up, I tried to step on the brake, but the brakes was moving so fast I couldn't step on it, and I missed it, and then I fell right in

(Testimony of Andrew Kovec.)

Q. Just explain to the jury what the brake was doing.

A. The brake was shaking, flying around, and I missed it. I didn't step on it. I missed it.

Q. You didn't get your foot on the brake?

A. No; I missed it and fell right in.

Q. Was the brake going back and forth laterally, as well as up and down ?

A. Yes, sir; all ways.

Q. Why did you attempt to put your foot on the brake, Andrew? A. I tried to stop the rope.

Q. Was it necessary for you to put your foot upon the brake to stop the engine? Were you required, I say, to put your foot on the brake to stop the engine?

A. It wasn't stopped. I couldn't put my foot on. It stopped when I put my hand in. Then it stopped.

Q. Could you stop the engine by any other means than by putting your foot on the brake?

A. I don't understand.

Q. Could you have taken hold of anything else to stop the engine, besides placing your foot upon the brake? A. No; you can't.

Q. Was there any covering over the gearing portion of the engine? A. No; not before.

Q. Where was the gearing portion of the engine with reference to where the brake was?

A. The brake was under the gearing.

Q. The brake was under the gearing?

A. Yes. You step with the foot on it. It is a kind of a foot brake.

(Testimony of Andrew Kovec.)

Q. When you attempted to put your foot upon the brake, you missed it?

A. Yes; and I fell into the gearing.

Q. What portion of your body went into the gearing portion of the engine?

A. The rope rider come up and pulled my hands out. My hands were right in the gearing.

Q. You say your hands? Which hand?

A. The right hand.

Q. What is that you have on now? What is that you have on your right hand now? What have you got on your right arm now?

A. I have got a rubber hand now.

Q. A rubber hand? A. Yes, sir.

Q. Were all your fingers caught in the gearing portion of the engine?

A. Yes; all the fingers was smashed. These two fingers were pulled out, and then it was smashed through up here. It smashed it, and took the skin and bones all off, clear up to here. There was a little skin left here.

Q. You say those two fingers were pulled right out?

A. Yes; those two were pulled right out.

Q. Who assisted, did you say, in taking your hand out? A. What do you say?

Q. Who helped you to take your hand out?

A. Jerry Milautz and Frank Sturgle. They pulled me out.

Q. Where were you, Andrew, when Testovarsnik, the foreman, told you to pull up the cars, with refer-

(Testimony of Andrew Kovec.)

ence to where the engine was? How far away from the engine were you?

A. I was over thirty feet.

Q. Over thirty feet?

A. Thirty feet, or something like that.

Q. Why did you go to the engine when you went to pull up the cars? A. I fell in.

Q. No; you don't understand me. I say, why did you go to the engine when you attempted to pull the cars out of the mine?

A. I don't understand you exactly.

Q. How often did you use this engine before, for the purpose of pulling cars out of the mine? Did you ever use the engine before? A. No.

Q. Then why did you go to the engine when your foreman told you to pull the cars out?

A. Because I am scared of getting fired or something like that. Of course I have got a family. I have to work.

Q. Why did you go to the engine to pull the cars out of the mine? No; I will withdraw that question. Did you ever operate any kind of an engine like that before? A. No, sir.

Q. Did you ever use this engine before this particular morning? A. No, sir.

Q. How long had you used this engine that morning when you went into the gearing portion of it?

A. I was just on the first car.

Q. The first car? A. Yes.

Q. How long had you been using it before you got injured? How many minutes?

(Testimony of Andrew Kovec.)

A. About ten or five minutes.

Q. About ten or five minutes? A. Yes.

Q. How long had Testovarsnik been your foreman before you were injured?

A. About four or something like that, or five.

Q. Four years? About four years?

A. About four.

Q. He had been your foreman then before for about four years?

A. Yes; I couldn't say exactly when he started. It was about four years, anyway.

Q. You were subject to his orders during that time? During that four years, what were you doing?

A. Well, I don't know.

Q. Don't you know whether you were digging coal,—or what were you doing?

A. You mean I, myself?

Q. Yes; you, yourself. What were you doing during the four years that Testovarsnik was foreman of the mine? A. Digging coal.

Q. Digging coal? A. Yes.

Q. What were you doing just before you were ordered to pull up these cars by means of the engine?

A. I was in the air shaft there. I was working there. I was loading coal and rock out there when it caved in there.

Q. How long before the accident happened was it that you were doing this work?

A. I was there working about a week; over a week.

Q. About a week? A. Yes.

(Testimony of Andrew Kovec.)

Q. What were you doing the day before you were injured? A. The day before?

Q. Yes; on the 22d of September what were you doing? What were you doing on that day?

A. I was just working there in that place, loading coal and rock out.

Q. Loading coal and rock out?

A. Yes; and timbering.

Q. What were you loading coal and rock into?

A. Putting it into a car.

Q. What did you do the day before that?

A. The same.

Q. Were you unconscious, or did you get unconscious at the time you were injured? Do you remember of suffering any pain when your hand was caught in the gearing portion of the engine, and your fingers torn out? A. I don't know.

Q. Did it hurt you? A. Yes; it hurt me.

Q. Did you suffer very much with it?

A. Yes.

Q. Did you know when they took your hand out of the engine? A. Of course I knew it.

Q. Then you were not unconscious?

A. No.

Q. What was your condition after that? That is, immediately after. Did you suffer, or were you suffering any pain?

A. Yes; I suffered pain right along. I have got pain yet.

Q. You suffer pain now? A. Yes.

Q. Where do you suffer pain?

(Testimony of Andrew Kovec.)

A. In the end of the stump, right there (indicating).

Q. Who removed the remains of the hand from your arm? What doctor, if any?

A. Dr. Reynolds.

Q. Dr. Reynolds? A. Yes.

Q. Of Aldrich? A. Yes.

Q. How long was it after the accident that he removed your hand?

A. I don't know how long it was.

Q. Well, about how long? How many minutes or hours?

A. It took a couple of hours, pretty near, I heard other fellows say.

Q. What portion of your hand was left before he took it off? That is, how many fingers were there on your hand?

A. Three fingers, but it was pulled out like this (illustrating). There was only skin there, from here (indicating). These two were pulled right out.

Q. What was the condition of the bones back here in your hand? A. All smashed.

Q. Did you suffer any from the time that you were injured until your hand was removed? Did you suffer any pain? A. Yes.

Q. At the time you were injured, what wages were you getting?

A. I was getting three sixty at that time.

Q. Three sixty? A. Yes.

Q. What do you mean by that? Three sixty a day, or a week, or what? What do you mean by

(Testimony of Andrew Kovec.)

three sixty? Do you mean three dollars and sixty cents, or what? A. Yes.

Q. How often did you get that three sixty?

A. I got it a day.

Q. A day? A. Yes.

Q. Were you paid monthly?

A. No; it was day work.

Q. Yes; but you received your pay once a month, did you not? A. Yes; once a month.

Q. Generally, at the end of the month, how much did you get from the company?

A. At the end of the month?

Q. Yes; at the end of the month, how much would your pay check be?

A. I don't know how much it is. It is over one hundred dollars.

Q. What have you been earning since then, if anything? How much a day have you been earning since you were injured? A. Nothing.

Q. None? A. No.

Q. Have you worked for the Montana Coal and Coke Company since that time? A. No.

Q. Have you worked for anyone else since that time?

A. No; I have stayed home right along.

Q. Why have you not worked?

A. Well, I couldn't work.

Q. Ordinarily, how many days out of the month would you work while you were working for the company?

A. How many days?

(Testimony of Andrew Kovec.)

Q. Yes. How many days out of the month would you work when you were working for the company?

A. Every day. Sometimes Sundays I did not work.

Q. You say you worked every day except Sundays? A. Yes.

Q. Did you sometimes work Sundays?

A. Sometimes I worked Sundays, and sometimes not.

Q. Going back now to the time when the foreman told you to take charge of the engine. Did he tell you how,—what did he tell you that morning? What did he say to you?

A. He just told me to get in and pull the cars up when his driver had no time to pull them.

Q. Did he tell you how to run the engine?

A. No.

Q. Did he say anything else to you at that time? Did he say anything else to you at that time except to tell you to pull the cars up when the driver was not there?

A. No; he didn't tell me anything besides that.

Q. He said nothing else? A. No.

Q. Why was it that you didn't tell the foreman, when he told you to pull up the cars, that you didn't know anything about how to run that engine?

By Mr. DAY.—To which we object as immaterial.

(Argument by counsel for the respective parties.)

The COURT.—Let him answer.

By Mr. DAY.—Note an exception.

(Question read by the stenographer.)

(Testimony of Andrew Kovec.)

A. No; I didn't tell him. I didn't understand how to run the engine.

The COURT.—Evidently he does not understand the question. He says he didn't understand how to run the engine.

Q. Why didn't you tell the foreman, when he told you to take charge of this engine, that you didn't know anything about how to run it?

A. Because I can't tell the foreman anything so as to get to discharge me or something like that. I just got in and worked.

Q. Did you say anything when he told you to do that?

A. I didn't say anything at all. I just went to work.

Q. Did you know what the danger of operating such an engine would be?

A. I didn't know before.

Q. Did you know how to run the engine?

A. No.

Q. Did you know how to start it?

A. No; I didn't.

Q. Did you know how to stop it? A. No.

Q. That is all.

Whereupon, at twelve o'clock M., recess was taken until two o'clock P. M.

(Testimony of Andrew Kovec.)

Two o'clock P. M.

Direct Examination of ANDREW KOVEC (Resumed).

(By Mr. O'CONNOR.)

Q. Who, if anyone, was with you when you were instructed by the foreman of the mine to run the engine in the absence of the engineer or driver?

By Mr. DAY.—We object to that. That is not what the witness testified to at all.

The COURT.—I didn't hear that question. Read the question, please.

(Question read by the stenographer.)

By Mr. O'CONNOR.—I will withdraw that question.

Q. Who, if anyone, was with you when the foreman of the mine instructed you to pull up the cars when the driver was not there?

A. Frank Strugle.

Q. Did he hear the conversation between you and the foreman of the mine? A. Yes.

Q. What were you doing at the particular time that the conversation took place between you and the foreman of the mine?

A. I was inside, fixing a place, and timbering.

Q. Timbering the walls?

A. Yes; timbering the sides and top.

Q. Where was the driver, or the engineer of the engine when you took charge of the engine? Where was he? A. He was some place inside.

Q. That is all. You may take the witness.

(Testimony of Andrew Kovec.)

Cross-examination.

(By Mr. DAY.)

Q. How long have you been in this country, Mr. Kovec?

A. About eleven or twelve years,—something like that.

Q. Where were you born?

A. I was born in Austria.

Q. At what place? A. Lieber.

Q. Can you read English? A. No.

Q. Can you read the Austrian language?

A. Well, a little; yes.

Q. Where did you first work when you came to the United States?

A. I worked there in East Helena for a little while; not very long.

Q. You worked in East Helena? A. Yes.

Q. How long did you work in East Helena?

A. About half a month.

Q. Then you went up to Aldrich?

A. Yes. Then I went up to Aldrich.

Q. What did you do when you first went up to Aldrich? A. I was digging coal there.

Q. Had you ever dug any coal before?

A. No.

Q. When did you first get acquainted with Louis Testovarsnick? When did you first know him?

A. I knew him up there.

Q. Where? A. At Aldrich.

Q. He was there when you first went there?

A. What do you say?

(Testimony of Andrew Kovec.)

Q. Was he there when you first went to Aldrich?

A. I guess I was there before he was.

Q. You were there before he was? A. Yes.

Q. You didn't know him in the old country?

A. No.

Q. Did you know Frank Strugel in the old country? A. No.

Q. When did you first know him?

A. In Aldrich.

Q. How long has he been working there?

A. I can't say how long he has been working there, but it is a long time.

Q. He has been there pretty nearly as long as you have? A. Well, pretty close.

Q. This coal that you dig out,—what do you do with that? Do you put it in a car? A. Yes.

Q. Then what becomes of the car? What do you do with the car after you get it loaded with the coal?

A. Just leave it in the switch.

Q. Who takes it out of the mine?

A. The driver. The driver takes it out.

Q. Who was the driver at this time when you were hurt? Who was the driver then?

A. At that time the driver was Billy England.

Q. Were you mining coal that day you were injured?

A. I was timbering that day when I got hurt.

Q. You were putting in a set of timbers?

A. I was putting in a set of timbers, and fixing it up.

(Testimony of Andrew Kovec.)

Q. You were really cleaning out an air shaft, were you not? A. What do you say?

Q. You cleaning out an air shaft, were you not?

A. Yes; cleaning it and fixing it up.

Q. You were not mining coal that day at all?

A. Not mining coal?

Q. Yes; you were not mining coal that day?

A. I was loading coal in the car from this place.

Q. This stuff that you were putting in the car was waste from this air shaft, was it not?

A. Well, sometimes we put coal in, too.

Q. That is, in your work there in the air shaft, when you found any coal, you put it in?

A. Yes.

Q. But most of the stuff you took out that day was trash out of that shaft, was it not?

A. Yes.

Q. Had you been working in that particular place before that day?

A. I had worked in there before, of course.

Q. How long before? A. Over a week.

Q. Over a week?

A. Yes; something like that.

Q. Had you been mining in that part of the mine before? Had you been working in that part of the mine before this week?

A. One day before, I think. I don't know.

Q. How do you get in to where you work? How do you get into the mine? A. I walked in.

Q. You walked in? A. Yes.

Q. Do you walk by where this engine is?

(Testimony of Andrew Kovec.)

A. I went in and went to the main entry, and go right in where the air goes.

Q. Had you ever seen this engine before the day you went up there to try to work it?

A. No; I hadn't seen it.

Q. You never had seen it before? A. No.

Q. You had walked by there, in going to your work in the mine, for a whole week, and didn't see the engine?

A. I seen the engine, but I didn't see it worked.

Q. I didn't ask you that. I asked you if you had ever seen the engine before that day you tried to work it? Had you ever seen the engine before that day? A. I seen it when I went in.

Q. You saw it as you went by it on your way to your work during this week? A. Yes.

Q. During this time that you worked in this place, during this week before you got hurt, was the engine running every day?

A. I don't know whether it was running or not.

Q. How did you get the coal out if it wasn't running?

A. I don't know. I just put the cars on the switch.

Q. That is all you had to do with it. You don't know what became of the cars after that? You don't know what became of the cars after you put them on the switch? A. No.

Q. How far away from where the engine was, was this switch? How far away was this switch from where the engine was?

(Testimony of Andrew Kovec.)

A. About over thirty feet.

Q. About thirty feet? A. Over thirty feet.

Q. You had to go by the engine, or you had to walk by the engine in order to get in where you went to work?

A. I went by the engine, and then went around back to the place where I worked.

Q. Did you see anybody working the engine before you undertook to work it that day?

A. I didn't see it that day.

Q. I say before that day. During the week you were working there mining coal, did you see anyone working the engine?

A. Well, England was pulling it up.

Q. When you worked in the other part of the mine, did you ever see any other engines used for hauling up these cars of coal?

A. Well, sure, I seen the engines, but there was somebody running them. I never run any of them.

Q. You never ran any of them? A. No.

Q. Didn't you run an engine over in what they call No. 4? A. No.

Q. You never ran an engine at all of any kind?

A. No.

Q. During all the time you were there, you never ran an engine? A. No.

Q. And never saw one run? A. No.

Q. Never was around where it was running at all?

A. Not close.

Q. Never any closer to it than this distance of thirty feet, which you say is the distance between the switch and the engine when it is running?

(Testimony of Andrew Kovec.)

A. No.

Q. How does the engine work? How does it work in pulling up the cars?

A. I don't know exactly how it is worked.

Q. What does it look like? Has it got any wheels or ropes, or anything?

A. Well, it has got wheels and ropes.

Q. Just tell the jury how it looks.

A. I would have to have the interpreter in order to understand it better.

Q. Well, never mind. We will get along without the interpreter, I think. What time in the day was it when you were hurt?

A. About ten o'clock I got hurt.

Q. What time did you go on shift?

A. Seven o'clock in the morning I went on shift.

Q. Who went with you?

A. Frank Strugel.

Q. Was he your partner? A. Yes.

Q. Was there anybody else working in this slant with you? A. Not with me.

Q. Was there anyone else in the slant but you and your partner, Strugel?

A. There was someone else in there, but I didn't know who it was,—in that part.

Q. From that time, from seven until ten, was there anyone else there but you and Strugel?

A. No.

Q. Was there anyone else in the mine at all?

A. Yes; in the mine there was.

Q. Whereabouts in the mine were they working?

(Testimony of Andrew Kovec.)

A. Down below, and back there, when we come in.

Q. What were they doing?

A. They were digging coal, and all that kind of business.

Q. When did Louis tell you that you had to pull the cars up if the driver was not there?

A. He told me that morning.

Q. He told you that morning? A. Yes, sir.

Q. What time in the morning?

A. Before seven o'clock.

Q. Before you went to work? A. Yes, sir.

Q. Where was Louis at that time when he told you this? A. Down by the tool box.

Q. Was Frank Strugel with you when he told you? A. Yes; he was with me.

Q. Did he tell you to pull them up, or did he tell Strugel to pull them up?

A. He just told us to get in and pull it up.

Q. You didn't say anything to him?

A. No; I didn't say anything to him.

Q. Did Strugel say anything? A. No.

Q. Could Strugel run the engine? A. No.

Q. You didn't tell him you could not run the engine? A. No. I didn't ask him.

Q. You didn't ask him how to run the engine?

A. No.

Q. Or where the engine was? A. No.

Q. Did you know where it was? A. Yes.

Q. How did you know that?

A. I knew where the engine was, because I had worked in the back entry there.

(Testimony of Andrew Kovec.)

Q. You had seen the engine before?

A. Of course, I had seen it.

Q. Did you know how to hook the cars on, so as to pull them up? A. Sure I knew that.

Q. You had done that often?

A. I put the car on the switch and put the pin on.

Q. You had often done that, had you not? You did that every day? You did that every day, didn't you? A. Yes; just the car.

Q. How did you get the first car out that morning? A. That was the first car when I fell in.

Q. That was the first car? A. Yes, sir.

Q. You were working from seven to ten in getting that one car full? A. Yes; we were timbering.

Q. You timbered a while? A. Yes.

Q. Who pushed the car out of the slant?

A. I pushed the car out from the back entry, and my "buddy."

(In using the word "buddy," the witness evidently meant partner.)

Q. Who put it onto the rope? Who hooked the car on to the rope? A. Jerry Milautz, I guess.

Q. Who was he? A. He was there.

Q. What was he doing?

A. He was riding the rope.

Q. How do you mean?

A. He just hooked the rope on to the car.

Q. He is the fellow who hooks the car on to the rope? A. Yes.

Q. Was this rope that you hooked the car on to,—was the other end of that attached to the engine?

(Testimony of Andrew Kovec.)

A. Yes.

Q. What kind of a rope was it, wire or cotton?

A. Wire.

Q. Who went with you up to where the engine was? A. I went up.

Q. By yourself? A. Yes.

Q. Where was Jerry Milautz then?

A. He was right there.

Q. He was standing right near?

A. Yes; down below.

Q. Did you ask him anything about running the engine? A. No.

Q. Or Strugel, either? A. No.

Q. You just went up and started the engine?

A. Yes.

Q. How did you start the engine?

A. I just went up to see anyone get in and see them run that engine, but nobody was there. I never run it before.

Q. When you got up there, you didn't find anyone at the engine? A. No.

Q. How did you get the engine started?

A. I had seen somebody run it before.

Q. You had seen somebody start it before?

A. Yes.

Q. Whom did you see running it before?

A. I seen Billy England run it before.

Q. It was his business to run it, was it not? That is what he was there for?

A. Of course; but he was not there at that time.

Q. He was not there when you went up to the engine? A. No.

(Testimony of Andrew Kovec.)

Q. Had you seen him that morning?

A. No.

Q. Don't you know that he had been hauling coal up all the morning? A. No.

Q. And had simply gone into the entry with his loaded cars to haul them out of the entry, when you started to run the engine?

A. He had gone inside some place.

Q. What was he doing inside?

A. He had gone to pull some cars inside.

Q. He had gone to pull some cars inside?

A. Yes.

Q. Tell the jury how you started the engine. It was not running when you got up there, was it?

A. No.

Q. How did you start it?

A. I had seen it. I had seen him hold that—I don't know what you call it,—down, like this. (Illustrating.)

Q. The lever?

A. Yes. I seen him hold the lever down. That is all I seen.

Q. Whom had you seen do that?

A. I don't know. He is not here,—that fellow.

Q. Did you ever see Billy England do it that way?

A. I seen him before once, but not that day.

Q. How did you know how to start the engine?

A. I didn't know how to start it. I just seen him do that before.

Q. You didn't know what would happen when you pulled any of those levers?

(Testimony of Andrew Kovec.)

A. No; only I saw it going up and down.

Q. When you pulled this thing with your left hand, what happened?

A. That turned the engine.

Q. That turned the engine? Which way did the engine turn? Did it turn toward you or the other way? A. Any place.

Q. Any place? Now when you pulled this lever down, or turned this lever down, did it pull the car?

A. Yes.

Q. Then when you let go of it, what happened?

A. Well, that handle has to be turned.

Q. The handle has to be turned?

A. The clutch.

Q. You have to turn the clutch, too, do you?

A. Yes.

Q. Did you do that?

A. I turned the clutch.

Q. Then what happened? A. Then it ran.

Q. The engine ran then? A. Yes.

Q. Did it draw the car up? A. Yes.

Q. Did you know it would draw the car up when you turned it on that way? What did you do that for? A. So as to pull the car up.

Q. How did you know that would pull the cars up? A. I seen the other fellows do it.

Q. What did you do when the car got up to where you wanted it to go?

A. I tried to stop it.

Q. How did you try to stop it?

A. I tried to stop it with the brake.

(Testimony of Andrew Kovec.)

Q. Did you still hold on to the clutch?

A. I left that, and tried to step on the brake. The brake was shaky, and I missed it.

Q. It was light there, was it not? There was a light there, was there not? A. Yes.

Q. You could see the machine? A. Yes.

Q. You could see this brake shaking?

A. I could see it when I tried to step on it.

Q. You could see it?

A. I could see it, but I missed it.

Q. You missed it? But I say, you saw it there, did you? When you started to step, couldn't you see the brake?

A. Well, the rope was pretty close to me.

Q. Did you see this cog-wheel going around?

A. I seen it, but not when I started to step on the brake.

Q. But when the machine was running, couldn't you see the cog-wheel running around?

A. Yes.

Q. Do you know what makes it go around? Do you know what made it go around?

A. The electric made it go around.

Q. Do you know how the electric got into the machine? Didn't it get in there by some of those things you pulled? A. I didn't know that.

Q. Why did you pull them for, then? Why did you pull these levers if you didn't know what was going to happen?

(Testimony of Andrew Kovec.)

By Mr. NOLAN.—We object to that. The question is based upon a wrong assumption.

(Argument by counsel for the respective parties.)

The COURT.—Let him answer. Read the question.

(Question read by the stenographer.)

Q. Why did you pull the levers in the first place?

A. When the cars were going up—

Q. (Interrupting.) You pulled them to start the engine, didn't you? A. Yes, sir.

Q. That is what you wanted to do? You wanted to start the engine? A. Yes.

Q. When you wanted to stop the engine, did you let go of the levers? A. Yes.

Q. You let go of them? A. Yes.

Q. Did anything stop at all?

A. I went to step on the brake to stop it.

Q. Did you ever see anyone try to step on the brake before? A. No.

Q. How did you know it was a brake?

A. I could see the brake there around the wheel.

Q. You could see that that was a brake there for the purpose of stopping that wheel? A. Yes.

Q This cog-wheel,—how far away was that, can you tell,—the cog-wheel that you fell into?

A. That was pretty close. Not very far.

Q. It was right near? It didn't have any top on it, did it?

A. No: the brake was down here (indicating), and the wheel was up here (indicating).

Q. Up alongside of the brake? A. Yes.

(Testimony of Andrew Kovec.)

Q. It didn't have any top on it, did it?

A. No.

Q. It was revolving? It was turning around?

A. Yes.

Q. Going fast? A. Going fast.

Q. Was it turning from you, or coming to you? Which way was it turning? Was it turning to you?

A. It was coming to me.

Q. Now, this brake,—did you have to put your foot up or down to get your foot on to it?

A. It is not very high. It is something like that. (Illustrating height of brake.)

Q. Just stand up and show the jury how you did that. Catch hold of the levers you had hold of.

A. It was just about like this. I stood here on this side of it. There is a brake on the side, like this, and I just tried to step on it quick, so that the rope would not lick me,—the rope that pulls the car out,—I tried to step on it, and I missed it. I didn't step on it.

Q. So you didn't step on the brake at all, but missed it?

A. I missed it and fell right in the wheel.

Q. Fell right in the wheel? If you had stepped on the brake as you started to do, you would not have fallen, would you?

A. I don't know whether I would fall or not. I don't think I would. But if there was anything over those wheels, I couldn't put my hands in.

Q. None of those things that you caught hold of threw you into the wheel, did they?

(Testimony of Andrew Kovec.)

A. Well, the brake threw me in.

Q. But you missed the brake entirely?

A. Yes.

Q. And you fell because you missed the brake?

A. Yes.

Q. Where was Jerry Milautz when this happened? A. He was with the car.

Q. How far away was the car from you?

A. Not very far. About ten feet, or something like that.

Q. Was he on the car, or just standing alongside of it?

A. He was going along side of the car, running. He tried to put the brake on, so it would stop.

Q. As the car came along up, he came with the car, did he? A. Yes.

Q. Where was Strugel?

A. He was down at the place fixing something. I don't know what he was doing.

Q. He didn't come up with the car at all, did he?

A. Not at that time.

Q. He didn't come up until after you got hurt?

A. He come up when I got hurt.

Q. Where was Louis at this time?

A. He was inside some place at that time.

Q. He wasn't anywhere around there, at all, was he? A. No.

Q. He was somewhere else in the mine?

A. Yes.

Q. Did he come there when you got hurt?

A. When I got hurt he come around.

(Testimony of Andrew Kovec.)

Q. Jerry Milautz and Strugel came up, did they?

A. Yes.

Q. Did you tell Jerry how it happened?

A. I hollered to him. I said, "Hold me; I am on the wheels."

Q. Who stopped the machine?

A. My hand stopped the machine.

Q. Your hand stopped the machine?

A. Yes.

Q. It stopped as soon as you fell into it?

A. Yes.

Q. Who helped you out of it?

A. Jerry Milautz and Strugel.

Q. Was Louis there then?

A. Louis come up after that.

Q. Where did they take you? Did they take you out of the mine?

A. Yes; they took me out of the mine. They put me on a car, and took me out.

Q. Did you ask Jerry Milautz to go up and pull the car up? A. No.

Q. You had seen him there working with the cars right along, had you not?

A. Yes; I seen him. He was the rope rider.

Q. That was his business? It was his business to get those cars up, was it not? A. Whose?

Q. Jerry's?

A. No; he was just a rope rider.

Q. Well, it was his business to hook the cars on and get them up?

A. Yes; that was his business.

(Testimony of Andrew Kovec.)

Q. That was his business? A. Yes.

Q. It was not your business? A. No.

Q. Your business was to fill the cars?

A. Yes.

Q. How long before had you seen England that morning?

A. I don't remember whether I seen him that morning or not.

Q. Had you seen anybody else pulling any cars up that morning?

A. No; I didn't see it.

Q. How far inside of this slant—you call that a slant, don't you, where you were working? You call that a slant where you were working at that time?

A. Yes; we call that a slant. It goes back in. I was working in an entry. This place had been worked thirty feet.

Q. What do you call this place where you haul the cars up? Do you call that a slant?

A. Yes; that is what I call a slant. That was an entry where I was working. It was an air course.

Q. And it was a slant where they were pulling the coal up? A. Yes.

Q. When they got the cars up to the engine, they hooked the cars all together, and hauled them out with a mule, didn't they? A. Yes.

Q. That is what England did? He pulled the cars up, and hooked them together, and moved them out, didn't he? That is what Billy England was doing? A. He was driving; yes.

(Testimony of Andrew Kovec.)

Q. He was driving the mule, hauling cars out?

A. Yes.

Q. How far inside of this entry were you working that morning when you filled the car up? How far in this entry were you working?

A. Thirty feet or something like that.

Q. You don't know whether anyone else had been hauling any cars up there or not? A. No.

Q. That is all.

Redirect Examination.

(By Mr. O'CONNOR.)

Q. Andrew, you referred to Strugel as your partner. What do you mean by that?

A. By what?

Q. By the term "partner"? A. Partner?

Q. Yes. You told Mr. Day that Strugel was your partner? A. Yes.

Q. What do you mean by that? Did you mean that you worked together in the mine, or what?

A. Yes.

Q. That is all.

Witness excused.

[Testimony of Frank Strugel, for Plaintiff.]

FRANK STRUGEL, called and sworn as a witness in behalf of the plaintiff here, testified, through an interpreter, as follows:

Direct Examination.

(By Mr. O'CONNOR.)

Q. You may state your name.

A. Frank Strugel.

(Testimony of Frank Strugel.)

Q. How long have you lived in the United States?

A. The first five years and six months, and a year and six months. That is, I was in the old country during this time.

Q. From what country did he come to the United States?

The INTERPRETER.—What they call a province is a little different from the country. Do you want me to ask him for that?

Q. Just give the name of the country.

The INTERPRETER.—He always mentions the province. He names the province when I ask him for the country.

Q. All right. Just tell us what he says.

A. (The INTERPRETER.) I don't know what they call it. We call it in our language Stiermark, Lower Stiermark.

Q. How long have you worked in the mines at Aldrich? A. Four years and five months.

Q. Do you know Louis Testovarsnik?

A. Yes, sir.

Q. What position does he hold, if any, for the defendant company?

A. He works in the mine.

Q. Ask him if he has charge of the mine as foreman, or otherwise. A. In the coal mine.

Q. I mean Louis Testovarsnik?

A. He was a coal digger before.

Q. Ask him what he has done for the past five years. A. Coal digger. He digs coal.

(Testimony of Frank Strugel.)

Q. Ask him if Testovarsnik ever gave him any orders as to what he should do.

A. (The INTERPRETER.) He says he never gave him any orders. He don't understand.

By Mr. DAY.—Yes, he does understand. You just tell us what he tells you.

A. He did after he came back from the old country

By Mr. NOLAN.—I suppose, of course, you have an interpreter who is advising you whether this is a correct interpretation. It is quite a serious matter to make the statement that you did. I suppose, of course, you have an interpreter.

By Mr. DAY.—I could understand from what he said that he understood.

Q. How long have you known the plaintiff, Kovec?

A. I knew him five years and six months before, and about a year and a half after I came back from the old country.

Q. Ask him when he came back from the old country. A. Four years ago.

Q. Since he came back from the old country?

A. Yes, sir.

Q. What have you been doing for the Montana Coal and Coke Company?

A. The first year I was working in the ditch, and the next year I got a job in the mine.

Q. What did you do in the mine?

A. Dug coal all the time.

(Testimony of Frank Strugel.)

Q. How long did you work with the plaintiff, Kovec, in the mine digging coal, if at all?

A. Two months.

Q. How long did you work with the plaintiff Kovec, before he was injured?

A. About five weeks. I think about five weeks.

Q. Did you ever see Kovec run a hoisting engine before the 23d day of September, 1907?

A. Never.

Q. Prior to this five weeks before he was injured, how often during the day would you see Kovec in the mines? A. I seen him every day.

Q. For how long? A. Every hour.

Q. Ask him if he saw him every day for a year previous to the time that the plaintiff was injured.

A. Ever since we worked together, I seen him every day.

Q. What were the duties of Kovec while working for the defendant company?

A. They were putting up timbers.

Q. He didn't understand the question. What were the duties of the plaintiff, Kovec, while working for the defendant company?

A. Digging coal.

Q. Did you ever run an electric hoisting engine?

A. No.

Q. Did you ever run the machine that the plaintiff, Kovec, attempted to run on the morning of the 23d of September, 1907? A. No.

Q. Would you have known how to run it, had you been told to run it?

(Testimony of Frank Strugel.)

By Mr. DAY.—To which we object as immaterial.

By Mr. O'CONNOR.—I will change the form of the question.

Q. Could you operate the engine? A. No.

Q. Were you with the plaintiff Kovec, on the morning of the 23d of September, 1907, the morning that he was injured? A. Yes.

Q. Did you hear a conversation between Testovarsnik and the plaintiff, Kovec?

A. Yes; I seen them that morning before the accident took place.

Q. Ask him if he heard any conversation between Kovec and Testovarsnik, the foreman.

A. I was with him when he told him.

Q. Ask him if he heard what Louis Testovarsnik told him.

A. He told us that if the engineer or driver would not be there, then they had to pull the car up themselves.

Q. By what means would they pull the car up?

A. Pull with the engine.

Q. Did you see Kovec when he took charge of the engine? A. No; I did not see him.

Q. Did you see him when his hand was fastened in the gearing portion of the engine?

A. Yes, sir.

Q. Did you assist him in getting out? That is, in getting loose from the engine?

A. Yes, sir.

Q. What was the condition of his hand?

A. It was all torn up.

(Testimony of Frank Strugel.)

Q. Did Kovec seem to be suffering very much?

A. Yes, sir.

Q. Was he conscious?

A. He was pretty near conscious. We threw some water on him.

Q. That is all. Take the witness.

Cross-examination.

(By Mr. DAY.)

Q. Ask him if he ever saw any of the miners use this engine before. A. No.

Q. Ask him if he ever worked on the night shift.

A. Yes, sir.

Q. In this slant or entry?

A. He worked in the bottom of a slant.

Q. Ask him if Kovec ever worked on the night shift.

A. No; not at that time when he was working on the slant.

Q. Ask him if Kovec ever worked on the night shift. Not at that time, but if he ever worked on the night shift? A. Yes, sir.

Q. Ask him who hoisted the cars on the night shift? A. Eugene Simonich.

Q. Ask him if Eugene Simonich hoisted the cars all the time on the night shift, during the time he worked there

A. Simonich and another fellow. He does not know his name.

Q. Ask him if he ever worked in No. 4 slant?

A. Do you mean No. 4 mine?

Q. Yes. No. 4 mine? A. No.

(Testimony of Frank Strugel.)

Q. He never worked there? A. No; never.

Q. Ask him if Andrew Kovec ever worked in No. 4? A. I don't know.

Q. Ask him if he ever saw this engine operated?

A. No; I never seen anybody run that engine, except Andrew Kovec, my partner. *His* says his buddy. He means his partner.

Q. Ask him how long he worked in that slant?

A. About a month.

Q. Ask him again if he never saw anybody running the engine at all?

A. I never seen anybody around that engine.

Q. How did they get the coal hoisted up?

A. There were two men there pulling,—one at a time,—Simonich and another fellow. They were pulling one at a time.

Q. Where was he when Louis told them they would have to pull up the cars?

A. They were there by this slant on the main entry.

Q. The slant on the main entry?

A. Yes.

Q. How far away from the engine?

A. About ten feet.

Q. Could he see the engine from where he was standing? A. Yes, sir.

Q. Was there anybody with it then? Was there anybody at the engine then? A. No.

Q. Was it running? A. No.

Q. Tell him to say plainly in Austrian what Louis said to Kovec. Tell him to speak loud.

(Testimony of Frank Strugel.)

A. He told us that we should pull the cars when the driver would not be there, so we would go faster ahead with the cleaning of that entry.

Q. Ask him what he said?

A. He thought to himself that it would be right, so they got ready as soon as possible.

Q. Ask him what he said to Louis Testovarsnik?

The INTERPRETER.—He does not understand the question that I am driving into him. Shall I ask him again?

Q. Yes. Ask him what he said when Louis told him that?

A. I didn't say anything at that time when Louis said to us to pull the cars.

Q. Ask him what Andrew said?

A. Kovec said, We will do if we can.

Q. We will do if we can? A. Yes.

Q. Then what did Louis say? Tell him to tell us what Louis said then?

A. He said, Try it if you can.

Q. Then what did they say?

A. Then we said, we go down to a place and we start to work.

Q. Where did Louis go? A. I don't know.

Q. Where was Jerry Milautz at that time?

A. I don't know.

Q. At what time in the morning was this conversation? A. As soon as we came in.

Q. Ask him if there was anybody else in the mine at that time? A. Yes; there was.

Q. Where were these other people? Where were they at work? A. In the rooms.

(Testimony of Frank Strugel.)

Q. They had already gone to work, had they?

A. Yes, sir.

Q. Ask him who was the driver that day?

A. Bill. I can't mention the other name.

Q. Ask him to pick him out in the courtroom, if he is here.

A. His name is England. Bill England.

Q. Did you see him there that day?

A. I haven't seen him, but I heard that he was the driver.

Q. Were there any cars hoisted that day before Kovec tried to hoist this one? A. No.

Q. How do you know?

A. I know that it was the first car when the accident occurred.

Q. Ask him if anybody else had hoisted a car,—Andrew or anybody else? A. I don't know.

Q. How far inside of the air-shaft were you working?

A. Do you mean from the engine?

Q. I mean from the slant.

A. About thirty to thirty-five feet.

Q. Could you see the engine from where you were working? A. No.

Q. Could you hear it?

A. I could hear it.

Q. Where were you when Andrew went up to start the engine? A. By the switch.

Q. Could you see the engine from the switch?

A. No; I couldn't see it, because the knuckle was higher.

(Testimony of Frank Strugel.)

Q. Where was Jerry Milautz when Andrew went up to run the engine?

A. He went down into a slant.

Q. Was that at the time Andrew started the engine? A. Yes.

Q. Who hooked the car on to the rope?

A. I don't know.

Q. Ask him where he was when the car was hooked on? A. By the switch.

Q. How far was that away from where the car was? A. I don't know.

Q. Did you see the car hooked on? A. No.

Q. Did you see the car at all after it was loaded in the air-shaft?

A. Our car was on a switch after we loaded.

Q. Ask him why he didn't go up to run the engine instead of Andrew?

A. Because I didn't know how.

Q. Ask him why Andrew went up then?

A. I don't know.

Q. Did he and Andrew have any talk about running the car? A. No.

Q. How long had you been working with Andrew at this time? A. A little over a month.

Q. Did either you or Andrew call anybody, when you got the car out to the switch, to haul it up?

A. No.

Q. Did they see anybody at all when they got the car out to the switch in the mine?

A. No.

(Testimony of Frank Strugel.)

Q. Did they see any other cars around there that had been hauled up that day?

A. Not at that time.

Q. Ask him if he had a talk with Louis Testovarsnik about ten days ago at Louis' house, about this accident? A. I don't know.

Q. Ask him if he has talked with Louis about this accident lately? A. Yes, sir.

Q. Ask him when it was? A. I don't know.

Q. Ask him if it was at Louis' house?

A. I don't know where we did talk about it. I know we did talk some about it, but I don't know where.

Q. Ask him if he talked with him lately?

A. I don't know anything about just when it was or where.

Q. Ask him if he didn't tell Louis then that he didn't remember Louis' telling them to use the engine? A. I don't know.

Q. Ask him if he remembers anything he told Louis about it?

A. I don't know. We talked some about it, but I forget what we had been talking.

Q. Ask him if he has talked with anybody about it since he left Aldrich? A. I did.

Q. Ask him whom he talked with?

A. I didn't talk much about it since we left Aldrich—about that.

Q. Ask him with whom he has talked? Ask him not what he talked, but with whom he talked.

(Testimony of Frank Strugel.)

A. I have talked with Jerry Milautz, Andrew Kovec, with me (interpreter indicates himself), and he talked with Louis also.

Q. With whom also?

A. With Louis Testovarsnik. He has talked all around.

Q. Ask him if he told Louis since he left Aldrich how this thing happened? A. No.

Q. Ask him if he talked with Louis about the accident at all? A. Yes; we did.

Q. Since leaving Aldrich? A. Yes, sir.

Q. What did he tell him?

A. I said, "I hope he will be luck after such an accident happened to him."

Q. That was all he told Louis, was it?

A. Yes, sir.

Q. That is all.

Witness excused.

[Testimony of Jerry Milautz, for Plaintiff.]

JERRY MILAUTZ, called and sworn as a witness in behalf of the plaintiff herein, testified, through an interpreter, as follows:

Direct Examination.

(By Mr. O'CONNOR.)

Q. State your name. A. Jerry Milautz.

Q. How long have you lived in the United States?

A. Five years.

Q. How long have you worked at Aldrich?

A. I didn't work there steady. I was working for a while, and have been off again.

(Testimony of Jerry Milautz.)

Q. How long since you went to Aldrich?

A. It is five years ago last spring.

Q. What were your duties for the defendant company? A. Digging coal and riding rope.

Q. Do you know Andrew Kovec, the plaintiff in this case? A. Yes, sir.

Q. How long have you known him?

A. Ever since I come to Aldrich.

Q. Did you ever work in the mines at Aldrich with Kovec? A. No.

Q. Do you remember the occasion on September 23, 1907, when Kovec had his hand taken off?

A. Yes.

Q. Did you see him at the time that he fell into the engine? A. No.

Q. Did you see him before he got loose from the engine? A. Yes.

Q. Did you assist him in extricating himself from the engine? A. Yes, sir.

Q. What part of his body was fastened in the cog-wheels of the engine? A. His hand.

Q. Which hand? A. His right hand.

Q. Ask him what the condition of the hand was when it was removed from the cog-wheels.

A. It was so that I was scared to look at it.

Q. Did it seem to be pretty badly mashed up, or otherwise?

A. It was just like they tried to make a sausage out of it.

Q. Did Kovec seem to be suffering very much?

A. Yes.

(Testimony of Jerry Milautz.)

Q. Did you hear any conversation between Testovarsnik and Kovec on the morning of the 23d of September, 1907? A. No.

Q. Do you know anything about the condition of that engine at that time?

A. It was on a poor standing, because there was no guard over the wheels, and the brake was shaking,—working up and down.

Q. Ask him whether he observed whether or not the gearing portion of the engine was protected by any means?

A. Not before, but after the accident.

Q. Ask him if he observed any shields of any kind covering the gearing portion of the engine before Kovec fell into it? A. No.

Q. Did you ever see anybody operate the engine?

A. Yes.

Q. Where would the gearing portion of the engine be, with reference to the brake, of which you just spoke?

A. About that high from the brake, on the left side.

(Witness indicates distance with his hands.)

Q. The gearing portion, you say, is about that high from the brake. How close to the brake? That is, side ways.

A. Right close by.

Q. What caused the brake to shake and vibrate? What caused the brake to shake and vibrate, as you just stated? A. I don't know.

(Testimony of Jerry Milautz.)

A. As long as you had observed the engine, did it always shake in the manner which you have indicated?

A. I don't remember, but I think it was.

Q. Just explain to the Jury, or show the Jury how the brake moved, if at all.

By Mr. DAY.—I submit that this is immaterial, for the reason that Kovec testified that he didn't put his foot on the brake at all, that he missed the brake, and fell into the gearing by reason of his missing the brake.

(Continued argument and discussion by counsel for the respective parties.)

The COURT.—Let him answer. Read the question.

(Question read by the stenographer.)

By Mr. DAY.—I object to the question on the further ground that this witness has testified that he was not present at the time of the accident, and he doesn't know how it operated or moved at that time.

By Mr. O'CONNOR.—I will withdraw the question for the present, and ask another.

Q. How long before the accident did you see this particular machine in question?

A. About two or three months.

Q. Two or three months before?

The INTERPRETER.—He does not understand the question.

Q. Read the question, Mr. Stenographer.

(Question read by the stenographer.)

A. I saw it two or three months in that place.

(Testimony of Jerry Milautz.)

Q. When was the last time you saw the engine with reference to when this accident happened?

A. That time when he got hurt.

Q. How many hours before he got hurt did you see the engine? A. About five minutes.

Q. Five minutes before the accident?

A. Yes.

Q. Was the machine in operation when you saw it five minutes before the accident?

A. I see the engine going around when I come up with the car.

Q. When was that with reference to when Kovec got his hand in the engine?

A. I came up on a knuckle with a car, and I uncoupled the rope from the car, and then I went down with the car on the "pardin." I spragged up the car so that the driver could take it out then.

Q. Were the cog-wheels of the machine still revolving when you went to assist Kovec out of the machine? A. It was standing still.

Q. Do you know how long Kovec was operating the engine when he was hurt?

A. About five minutes.

Q. That is all.

Cross-examination.

(By Mr. DAY.)

Q. What is your business?

A. Riding rope.

Q. Tell the Jury what riding rope means.

(Testimony of Jerry Milautz.)

A. Riding rope means where they are working in a slant, they pull up a trip, couple up the cars, and come up with them.

By Mr. DAY.—(Addressing the Interpreter.) Is that what he said?

The INTERPRETER.—Yes, sir.

Q. He rides up in the cars that are pulled by the rope, does he, or does he ride on the rope, or on the car? A. On the car and on the rope.

Q. On the car and on the rope both. Who fastens the cars to the rope? A. I did.

By Mr. DAY.—(Addressing the Interpreter.) Let us see, Mr. Interpreter, if we can't get on without you a minute in the examination of this witness.

The INTERPRETER.—All right.

Q. Can you talk English? A. Not well.

Q. Can you understand me?

A. Some; but not all.

Q. How old are you?

A. Twenty-one years.

Q. How long have you been in this country?

A. Five years ago last winter.

Q. How long have you been working for the company?

A. Three or four months once since I come. I worked about half the time since I have been here. I haven't worked steady.

Q. What were you doing on this day of the accident? What were you doing at the time Andrew got hurt?

(Testimony of Jerry Milautz.)

A. I was working right down there. My business was to follow the cars up.

Q. Your business was to follow the cars up. That was your business—to hook the cars on and ride up with them to this knuckle? A. Yes, sir.

Q. Who took charge of the cars then?

A. The driver.

Q. Who was the car driver then?

A. It was Billy England.

Q. What time did you go to work that morning?

A. About seven o'clock.

Q. Where was Billy England when you started to work that morning?

A. I don't know. We pulled up a couple of cars —I don't know just how many. Then we had to go to the next slant back, so we—

Q. (Interrupting.) How many cars would you lift up to the knuckle at a time?

A. At that time two. Sometimes there was only one.

Q. Generally did you pull more than one?

A. We generally pulled two cars.

Q. Pulled two cars up to the knuckle generally?

A. Yes, sir.

Q. Then how many cars would England pull with the mule?

A. I don't know. Four or five, I guess.

Q. He would haul four or five cars with the mule?

A. Something like that. Sometimes more and sometimes less.

(Testimony of Jerry Milautz.)

Q. Did this rope that pulled the cars up run around the drum at the engine? A. Yes.

Q. That was the way they pulled the cars up, was it? A. Yes.

Q. How long had you been working there at the engine?

A. Not quite two months before that.

Q. Had England been there with you all the time?

A. I can't tell you about that.

Q. Most of the time was he there?

A. He was there at that time, I know.

Q. What shift did you work?

A. Day shift.

Q. Day shift? A. Yes.

Q. You went on at seven o'clock?

A. Yes.

Q. And when did you go off?

A. At half past three.

Q. Did you ever work any on the night shift?

A. Not in there.

Q. How long had Andrew Kovec been working there before the day of the accident?

A. I couldn't tell you.

Q. Two or three days?

A. I guess it was all of a week.

Q. Did you know Andrew very well?

A. Yes.

Q. How many other people were there working in that slant that day?

A. I couldn't tell you how many. Sometimes eight or ten men worked there.

(Testimony of Jerry Milautz.)

Q. Sometimes you worked eight or ten?

A. Yes, and sometimes less.

Q. About how often would you have to haul these loaded cars up? A. About 300 feet.

Q. I asked you how often. You say you hauled them about 800 feet?

A. No; about 300 foot. Right up to the knuckle, or right below about fifty feet or so.

Q. How many cars would you haul up in a day usually? A. I don't know much about that.

Q. You don't know much about that?

A. Because I didn't keep any track of it.

Q. You didn't keep track of that? A. No.

Q. Had you hauled up any cars this day that Andrew got hurt before he got hurt? A. Yes.

Q. Do you remember how many you hauled up?

A. I couldn't tell you, because I don't remember.

Q. Who ran the engine for the other cars, in hauling them up? A. Billy England.

Q. How long before the accident had you hauled a car up? Do you remember?

A. I don't remember.

Q. Did you see Andrew when he started to run the engine?

A. Yes; I was going down with a car at that time.

Q. With an empty car? A. Yes, sir.

Q. He was running a loaded car up?

A. Yes.

Q. Who hooked that car on to the rope?

A. I did.

Q. Then you came up when it started?

(Testimony of Jerry Milautz.)

A. Yes, sir.

Q. Did you call Billy England?

A. No; he was on the inside, in the next slant.

Q. How long had he been in there?

A. He come back after Andrew got hurt.

Q. How long before Andrew got hurt had Billy been running the engine?

A. Just before. It might have been five or ten minutes. I don't remember. A few minutes.

Q. Just a few minutes before? Now, as you went down on the empty car, the engine pulled the loaded car up, did it?

A. I went down first, and then I hooked on the load, and they pulled it up.

Q. Where were you when the loaded car got to the top or to the knuckle?

A. When it got up, I uncoupled it, and the car started to run, and I picked up the sprags, and I spragged it in at the place where I wanted to stop it. I didn't know at first what happened. But when I come back there, I seen his hand sticking in the gearing, and I seen it was all skinned. It was just like pork chops, all smashed up.

Q. Just a minute. Let us get back to this car. You say the loaded car started to run down the hill when you uncoupled it?

A. It started to run; yes.

Q. And you stepped off to put a sprag under it?

A. Yes.

Q. And that is when the accident happened, is it?

A. Yes, that is the time.

(Testimony of Jerry Milautz.)

Q. How far were you away from the engine at that time, do you suppose?

A. About thirty to fifty feet, or something like that. I don't remember.

Q. Thirty to fifty feet. You were not that far away, were you? A. Yes.

Q. Were you as far away from the engine, as it is from you across this room?

A. I didn't want to leave the car there where it was, because you couldn't pass it in that place with the mule. It was from thirty to fifty feet from the engine, and that is where I put the sprag in. I wanted to stop it there, because there was more room there, so that you could pass it with the mule.

Q. Did you ever see Andrew run the engine before? A. No; I didn't.

Q. Did he say anything about running it that morning? A. No.

Q. You didn't have any talk with him about that?

A. Not before.

Q. Did you run the engine yourself that morning?

A. Yes, I did.

Q. Did you frequently run it when England was away, when he was in the mine somewhere?

A. Sometimes, if I got somebody to ride the rope, I pulled it up sometimes.

Q. If Andrew had ridden on the car, could you have run the engine for him? If Andrew had ridden on the car, you could have run the engine for him, could you not?

(Testimony of Jerry Milautz.)

A. It was my own business to go down. I didn't like to go up and work the engine.

Q. I know, but I say if Andrew had ridden on the car, you could have run the engine, could you not?

A. Yes, but I didn't want to go up and run it.

Q. You had been running the engine that morning, had you not? A. Yes.

Q. Did you have any difficulty in stopping it? Could you stop the engine easily?

A. Well, the engine generally run a few minutes or so after the rope stopped, and then we got it unhooked, and then we stopped it with the brake.

Q. After you got the car unhooked, it didn't make any difference if the engine did run, did it?

A. It makes a difference sometimes.

Q. Was there a light there where the engine was?

A. Yes.

Q. You could see all around it, could you not, with that light?

A. Well, the light got dirty. It had dust on it, and it did not shine very well.

Q. You could see the cog-wheel without any covering on it, with the light that you had, could you?

A. Yes.

Q. And you could see the brake, could you?

A. Not very well sometimes.

Q. But I say you could see it? A. Yes.

Q. Where was Louis when this thing happened?

A. He was just coming at that time when he got hurt.

Q. He was just coming up there?

(Testimony of Jerry Milautz.)

A. Yes. He was coming from some place. I don't know where.

Q. Had you seen him around there before that morning?

A. I seen him when we went in in the morning.

Q. I think that is all.

By Mr. O'CONNOR.—That is all.

Witness excused.

(Whereupon at four o'clock P. M., further hearing herein was continued until Thursday, January 7, 1909, at ten o'clock A. M.)

[Testimony of Nate H. Drummond, for Plaintiff.]

Thursday, January 7, 1909, Ten O'clock A. M.

NATE H. DRUMMOND, called and sworn as a witness in behalf of the plaintiff herein, testified as follows:

Direct Examination.

(By Mr. NOLAN.)

Q. What is you name?

A. Nate Drummond. Nate H. Drummond.

Q. Where are you living?

A. At the present time I am stopping in Livingston, but my home is in Aldridge. That is where I vote.

Q. In what business are you engaged?

A. I am a mechanical engineer by trade.

Q. For how long a time have you followed the business of mechanical engineer?

A. For the last twenty years, or over.

Q. Were you ever in the employ of the defendant company? A. Yes, sir.

(Testimony of Nate H. Drummond.)

Q. In what capacity?

A. As an engineer, and also as a mechanical engineer; repairing machinery, and setting it up.

Q. How recently have you been in the employ of the defendant company?

A. Not for close to a year and a half, I would judge. I don't know exactly.

Q. Do you know whether you were in the employ of the defendant company at any time during the year 1907?

A. I think I was for a short period, but I don't remember just how long.

Q. Do you know this hoisting engine that we were talking about yesterday, on which the plaintiff was injured? A. Yes, sir.

Q. As a matter of fact, did you have anything to do with the installation of the hoisting engines that were used in the mine there?

A. Yes, sir; I did at one time.

Q. Take this particular hoisting engine, where the plaintiff was injured, who was it who installed that engine at the place where it was at the time he was injured?

A. I moved it down from No. 4 mine. I moved it in there, and set it up partially.

Q. Did you have anything to do with it, in connection with its installation in the No. 4 mine?

A. I moved it several times, under the instructions of the Superintendent, from one place to another.

(Testimony of Nate H. Drummond.)

Q. I will ask you to state whether you had anything to do with the installation of the other hoisting engines that they had in the mine there?

A. Yes, sir.

Q. Now, do I understand that this hoisting engine where the plaintiff was injured was out in the open? A. No, sir.

Q. Was it in the mine? A. In the mine.

Q. At what depth? Are you able to tell us at what depth it was stationed in the mine?

A. It is pretty hard for me to answer that. I would judge it was in there pretty close to a mile underground. I don't know the exact distance, but I would judge it was somewhere near that.

Q. Where would it be with reference to any passageways through which the cars would be taken?

A. It was setting in the main entry, or in what is called the main entry or straight. The engine was up at the top of the slant, and was used to pull the cars out of the slant, to the main track. They pulled the cars out with mules from there to the parting, and from there the electric motor takes them to the surface.

Q. What particular duty did this engine discharge? What was it required to do?

A. It was required to pull those cars up,—the loaded cars out of this slant or drip. Where it was too steep to pull them up with the mules, they used those small hoists.

Q. After the cars were brought up this slope, where were they placed, with reference to the engine?

(Testimony of Nate H. Drummond.)

A. They were pulled up over a switch. There is a switch takes off, or a track takes off down on to the slant. The engine pulls them up over this switch on to the main track, and from there they are taken on to the surface.

Q. When you speak about the main track, where would the main track be with reference to the hoisting engine?

A. Right close to it. The hoisting engine sets over to one side of it.

Q. Where would the commencement of the dip be, with reference to the engine that would bring the cars up?

A. I should judge somewhere about thirty feet. It was somewhere about thirty feet, I should think, from the engine to the switch, where the cars ran up there. I haven't been in there for a long time, and I don't just remember.

Q. Then, after the cars were brought up the slope, and placed on the track close to the engine, would that track be a level track, or would it be on a slope?

A. This would be a level track, or it was supposed to be.

Q. How were the cars taken from that track to the surface?

A. They were taken part of the way, or hauled out with mules to what they call the parting. Then from the parting out, they are taken with an electric motor, to the surface?

Q. Taken through a tunnel? A. Yes, sir.

(Testimony of Nate H. Drummond.)

Q. So that, if I understand the situation correctly, all of this is right in the ground, and upon what sources are they dependent for light?

A. There are electric lights around those particulars and those small hoisting engines.

Q. These electric lights are distributed along there how?

A. Well, wherever there is a parting, a side track you understand, there is an electric light, and at all the places where these little hoisting engines are set, they have lights around them, electric lights, but between them, there is only a light once in a while at the trap-doors.

Q. Those lights are lights like you see on the streets, here, or are they those little bulbs?

A. They are sixteen candle-power, and thirty-two.

Q. Proceeding, now, to the engine itself, we haven't any drawing of it here, and I would like to get as clear a conception of it as possible. What kind of an institution was it?

A. Well, in the first place, the drum or gear is similar to that on any of these little hoisting engines that they use for hoisting material up on buildings, and that are run by steam or electricity.

Q. You speak about a drum. What is a drum, and what purpose does it subserve?

A. That is the portion of the engine that the rope winds on. It is called a spool or drum.

Q. How do they effect the bringing up of the car?

A. When this was thrown in gear—there is a friction lever that pushes the drum toward the gear,

(Testimony of Nate H. Drummond.)

and there are friction blocks fastened to the drum that presses against this gear, and by pulling this lever over, there is a left-handed screw that fits in in a little boxing there, and, pulling it toward you, shoves a pin against the key that goes up and down that slot that the drum is pressing against, and this key presses the drum over against the gear and starts it up.

Q. There is a rope there that revolves around the drum, and is attached by one end to the car?

A. Yes, sir.

Q. What are the other pieces of machinery in connection with the engine that are utilized when the engine is in operation?

A. There was the large gear that I was just speaking of on the drum shaft. That is where the friction joins, and from that there is a smaller pinion, I should judge about eight inches in diameter, that connects with this large gear on an intermediate or counter-shaft, and then, outside of that, there is another gear about sixteen inches in diameter, that connects with the pinion on the electric motor. This gear sets out to the left of the timber, the large one, and the smaller one that connects with the large gear that turns the drum,—they are about that distance apart, I should judge (witness indicates a distance of about fourteen inches); then the motor sets back here, and connects with this gear without about a four-inch pinion.

Q. Now, how was the engine operated? How was it set in motion?

(Testimony of Nate H. Drummond.)

A. In place of using a controller or starting-box, the same as they use on a street-car, this contrivance that they had arranged there was much better for the mine, and handier, too. They would take a barrel, a common whiskey cask, and cut off a hoop or two, and take off some of it, making it a kind of a tub, and put water in it. Then they would make a lever out of a two by four, or something like that, and bore a hole through it, and put a bolt through there, and fasten it on to a timber, letting one end of it project over in order to put a weight on that end to balance the lever. Then an electric wire came in, and was connected to this lever,—just tied, you understand, just fastened on to it,—and with a V-shaped plate of steel, boiler plate steel, probably about twelve or fourteen inches in length, and say, twelve inches across at the top, fastened to it. On the bottom of this barrel or tub there was placed a plate, and there was an electric wire running to this plate up here, and connected to it, and when this lever was raised up, it raised the steel plate out of the water, and that broke the current. By pulling down on the lever, as soon as this piece of steel up here came in contact with this water in the tub, it started the engine. That is, it completes the circuit.

Q. As I understand it, there would be a plate in the bottom of the tub? Is that what you wish to give us to understand? A. Yes, sir.

Q. And the electric wire would be connected with a plate? A. Yes, sir.

Q. And that is what supplied the current?

(Testimony of Nate H. Drummond.)

A. Yes, sir.

Q. Then there would be some water over that plate in the bottom of the tub? A. Yes.

Q. And then there would be something to be dropped into that water?

A. Yes; that is the other wire, to complete the circuit.

Q. And the water in the tub would be the medium, through which the electricity would pass from one wire to the other? A. Yes, sir; the medium.

Q. If I understand you correctly, then, there would be a dropping into the water of this handle for the purpose of getting the electrical power?

A. Yes, sir.

Q. Is that all that it would be necessary to do in order to get that machine working?

A. Yes, sir.

Q. How would that affect this gearing?

A. This gearing starts in motion. As soon as you drop this piece of steel down, when you pull this lever down, and this plate touches the water, that puts your engine in motion.

Q. Now, is there any appliance by which this gearing is to be thrown off or on?

A. No, sir; only through this handle, this lever, by breaking the current.

Q. By breaking the current?

A. By breaking the current.

Q. The gearing is composed of wheels with cogs that interlock, like this, and revolve? (Illustrating.) Is that the way? A. Yes, sir.

(Testimony of Nate H. Drummond.)

Q. And is it thrown out of place by any mechanical device? A. No, sir; not on that engine.

Q. Not on that engine? A. No, sir.

Q. You were the one who installed it?

A. Yes, sir.

Q. So you ought to know. Now, is that machine automatic? Does it operate without anybody directing the movement of it?

A. It is operated by electricity.

Q. Does it require the presence of a man there to handle it? A. Yes, sir.

Q. Now, is there any other device that is operated there in connection with the engine?

A. That is about all there is to the engine, with the exception of throwing it in and out of gear, and handling this friction brake.

Q. When you speak of throwing it in and out of gear, you have reference to dropping this handle into the water and taking it out?

A. No, sir. It is throwing this lever up against the large gear. It is a friction—it is not a clutch. All you have to do, as I explained, is to pull this lever; there is a left-handed screw and a pin that pushes against the shaft—

Q. (Interrupting.) You told us about that before. Now, why is it necessary to handle that, and what is to be accomplished through the handling of it?

A. In order to loosen the drum. You can let your engine run right along, and throw it out or in. You can wind up your rope, and catch your drum

(Testimony of Nate H. Drummond.)

with the brake, and throw it out, and hold it, and let your engine turn.

Q. That is, without handling this lever that operates the drum?

A. When your engine is in motion, you can run the engine without turning the drum, or by pulling this lever back that puts the drum in motion.

Q. Supposing that you desire to stop the drum, what would you be required to do?

A. To stop the drum from turning when the engine is running.

Q. Can you stop the drum when the engine is running? A. Yes, sir.

Q. Supposing the engine is running now, and you desire to stop the drum, what are you going to do?

A. I will throw this friction lever up away from me, in this direction (indicating), and place my foot on the brake, and let the engine run and the drum stand still.

Q. That is to say, when you throw this lever away from you, that disconnects the drum from the machinery? A. Yes, sir.

Q. The only way you have of stopping the drum, unless you let it run until it stops itself, would be by the application of the brake?

A. By the application of the brake; yes, sir.

Q. Now, we will take up the brake. What kind of a contrivance is the brake?

A. It consists of a steel band, lined with wooden blocks on the inner side, next to the drum, and it is

(Testimony of Nate H. Drummond.)

connected with a lever. It is a kind of a fulcrum; there is one part of the lever fastened to a bolt—I forget just the right name for it; it is a kind of a stirrup-like thing. Well, there is a bolt through there. Then there is a place at this end to put your foot on, and one portion of the band is fastened to the timber—this band that circles the drum, this big band. And the end of this lever is connected with the other end of this band, so that by placing your foot down upon the end of this lever, it tightens the band on the drum.

Q. Where was this treadle of the brake located?

A. That was right next to the gear; right close, on the left-hand side of the gear.

Q. Down close to the ground or away up some distance from the ground?

A. Down close to the ground.

Q. How large was it? That is, how wide across? As I understand it, it was a kind of a projecting thing?

A. It was not any larger than about the sole of your shoe, I should judge. That is, that was about the size of the one that I put on the engine in the first place. I don't know what is on it now.

Q. How was it situated with reference to any timbers being around there?

A. I haven't been in there for a long time. Of course, since I haven't been in the employ of the company, I haven't had a right to go there. In regard to the timber around the engine, I couldn't say. It may be changed. But as a rule, when the place

(Testimony of Nate H. Drummond.)

was started there, when the engine was set there, it was braced well; it was fastened on to the wooden frame that it sets on.

Q. What I am trying to get at is whether you have any recollection of any timbers extending up from the floor, any beams, and between those beams, that brake between them?

A. Yes, sir; there was two cross timbers, two eight by eights or six or sixes, I forget which now, that ran across, and this brake was right in between. If I remember the way I had it set there, this lever or treadle, as some people call it, came underneath here, and in order to get your foot on this treadle, you had to place your foot down in between these two timbers, in a space of about this width (indicating).

Q. Where was the light that furnished light to the person who was operating that machine?

A. The light was right back of the engineer's head when I was there.

Q. On one of those timbers?

A. On one of those timbers or posts.

Q. And up above him? A. Yes, sir.

Q. Was that the only light that was there?

A. I don't remember just how many they had. Sometimes they had two or three.

Q. I am speaking, of course, as to what your recollection is as to this particular locality.

A. That I could not answer.

Q. Now, then, at the time that you installed this machine there, and when this treadle was there, do

(Testimony of Nate H. Drummond.)

you recollect whether it had any tremulous or vibratory motion?

A. Why, they shake a little, more or less. They always did on that engine, but I never noticed in particular whether it had any.

Q. To what did you attribute that vibratory motion? What was the cause of it?

A. Sometimes the drum becoming worn and bobbing on the shaft would cause it, or the brake getting too loose, or, possibly, the brake band may have lost its elasticity, and does not spring away from the drum as it should, it kind of catches the drum as it rotates.

Q. In the light of this tremulous motion, and in the light of the location of the treadle there, what have you to say as to whether or not there is any likelihood of a person slipping in handling that treadle?

By Mr. E. C. DAY.—We object to that as calling for a conclusion of this witness on a subject about which he has not qualified himself to testify. It has not been shown that he operated this engine; he has merely testified that he set it up.

The COURT.—He is an expert witness, and worked around the machines there. Let him answer

By Mr. E. C. DAY.—Note an exception.

Q. You may answer the question.

A. I should think there would be danger of a man slipping off from this brake if he happened to step down between those two timbers.

(Testimony of Nate H. Drummond.)

By Mr. E. C. DAY.—Now, if the Court please, we move to have the answer of the witness stricken out for the reason that there is no allegation that the machine was defectively constructed. This is objected to as incompetent, irrelevant and immaterial.

By Mr. NOLAN.—We are going to go to the Jury, under the instructions your Honor will give, upon the theory that this was a perfectly constructed machine, and that this tremulous motion was a part of the operation of the machine; but that this machine was of such a character that it was the duty of the company to advise the plaintiff fully of the manner of its operation. That is, that is the theory upon which we will submit our case, aside from our contention that the gearing should have been protected, which we shall reach later on.

The COURT.—The motion is denied.

By Mr. DAY.—Note an exception.

Q. Now, going back a moment again to the use of the machine in the bringing up of the cars, what was to be done by the operator, the person who was working the machine, and what pieces of machinery did he have to handle in bringing the cars up the grade, and up to the top of the elbow or switch, or whatever they call it?

A. In the first place, you get a signal when they are ready to send the car up. The man running the engine first throws his friction in to tighten his drum so that his drum will tighten and turn with the gear. Then he throws the lever up, connects this plate with the water,—pulls down on the

(Testimony of Nate H. Drummond.)

lever until the plate comes in contact with the water, and that starts the machine. When the car comes up near the top of the slant, it is all of the best plan to have your brake where you can get your foot on it in time to stop it from rotating or turning any more after the rope rider, the man who comes up with the car and unhooks the rope from the car, gets to the top and unhooks the rope. After he unhooks the rope, the strain is released off the drum, and the drum would give several revolutions and bring the rope right back into the drum, if the engineer didn't stop it with the brake in time, throw it out of gear, that is, release his friction.

Q. Now, Mr. Drummond, there was something said here yesterday by the plaintiff that I didn't just exactly comprehend. He said that he was afraid of the rope, or afraid that the rope was going to strike him. How would that be possible?

A. As I just explained, after they unhook the rope from the car after the car is brought up, the drum will probably make two or three revolutions, and that will bring the end of the rope in over the drum,—you see the end will fly around.

Q. That is, the rope would fly around?

A. That would bring the loose end of the rope, when it is unhooked from the car, back into the engine.

Q. Do you know whether there is an iron coupling at the end of the rope? A. Yes, sir.

Q. What have you to say as to whether or not there is any danger of that iron coupling striking the operator?

(Testimony of Nate H. Drummond.)

A. Yes, sir; if he lets the rope come too far, if he lets that rope come in and his engine is going or running fast.

Q. Is the coupling of such a character that if it struck him, it would imperil his life?

A. Yes, sir.

Q. Kill him? A. It may.

Q. So that, then, if I understand you correctly, when the cars are being brought close to the top of the slope, what different things is the operator required to do and to look out for?

A. He wants to be ready to stop his engine at the right place when the car comes to its landing; also catch his brake, or have his foot where he can catch his brake, and release this current, let the lever up; and stop his engine from rotating any more, in order to keep this rope from coming into the machine.

Q. Now, going back a moment again to this gearing that you spoke about, where was this gearing with reference to the location of the man who was operating the engine?

A. The gearing was right close to his left. Right close to his left-hand side. He stands this way (illustrating) to operate his engine. Here is the lever that he throws the friction in and out with. By drawing it to him he connects the drum up with the gear, so that it will wind, and by throwing it this way, it releases it.

Q. Is this gearing a big institution?

(Testimony of Nate H. Drummond.)

A. The large gear is somewhere about three feet, I should judge. I don't remember exactly.

Q. What have you to say as to whether it has any cog-wheels or not? A. Yes, sir.

Q. At the time that you installed the machine there, do you know whether or not there was any guard or any shield over those cog-wheels?

A. No, sir; there was no shield or guard there.

Q. What have you to say as to whether or not, if a person conducting operations there should slip in any way, there would be any likelihood that he could get into that cog-wheel business?

A. Yes, sir.

Q. Now, having in mind the machinery as it was there, and what might likely happen in connection with the operation of that machinery, would you say that those cog-wheels that were exposed were reasonably safe in the case of even an experienced man in that department? A. No, sir.

Q. And how would it be in the case of an inexperienced man, a man who didn't understand how to operate? Would you say that those cog-wheels were reasonably safe there for such a person?

A. I should think it would be all the worse for him.

Q. I have reference, of course, to the gearing portion? A. Yes, sir.

Q. In the light of the fact that you are a mechanical engineer, and that you installed that machine there, what do you say as to whether or not an in-

(Testimony of Nate H. Drummond.)

experienced person could intelligently operate that machinery there without instructions?

Mr. E. C. DAY.—To which we object as incompetent, irrelevant and immaterial.

(Argument by counsel for the respective parties.)

Mr. C. B. NOLAN.—I will withdraw the question. That is all.

Cross-examination.

(By Mr. E. C. DAY.)

Q. How long did you say you had worked for the Montana Coal & Coke Company?

A. Why, I haven't stated yet how long I worked for them. I worked for them for four or five years, I guess, or five or six altogether.

Q. Were you working for them as a machinist?

A. I worked for them as an engineer, but I was really doing machinists' work, setting up machinery.

Q. You set up this engine originally, did you?

A. Yes, sir.

Q. Where was it first set up in the mines?

A. It was first set up in No. 4 mine.

Q. Was it in the same general condition in No. 4 as it was afterwards, when it was put up in this slant?

A. It was put in this slant just the same as in No. 4, in the same condition.

Q. What do they call this slant?

A. I think it is the second or third slant. I don't know exactly. I am not very well versed inside the mine.

(Testimony of Nate H. Drummond.)

Q. How long was this particular machine operated in No. 4 mine?

A. I couldn't tell you exactly. I didn't pay much attention to it. It was up there quite a while. I moved it once or twice in No. 4, under Mr. McGraw's instructions.

Q. Well, just generally speaking, how long was it there? Was it years, months, weeks or days?

A. Well, probably a year.

Q. How long had it been set up in this particular place where the accident occurred?

A. That I don't remember.

Q. The accident took place in September, 1907. Will that help to refresh your recollection?

A. I can't remember the date when I was working on the engine, when we set it up there in the straight.

Q. Was it a few days before or some considerable time before the accident occurred that you set up the engine there?

A. It was some considerable time after the engine was placed there.

Q. Who ran the engine as a rule, if you know?

A. Where it is setting now, at the present time?

Q. Yes.

A. No; I do not. I don't know who was running it.

Q. You understand, I don't mean at the present time; but at the time of the accident who was running the engine, if you know?

(Testimony of Nate H. Drummond.)

A. I suppose Andy Kovec was running it at the time of the accident, but I don't know who was supposed to be the engineer.

Q. Let us get over the sparring part of this now. Who was supposed to be the engineer in charge of the engine at the time of the accident, if you know?

A. I don't know, because I was not there.

Q. Do you know of anybody who ran it at any time during the time you were in the employ of the Montana Coal & Coke Company?

A. Yes, sir; I do.

Q. Who?

A. A man by the name of John Koheegan.

Q. Where did he run it?

A. He ran it when it was in No. 4 mine.

Q. You don't know who ran it in this slant?

A. No, sir.

Q. You never saw it operated in this slant?

A. No, sir.

Q. How can you say it was set up and operated in this slant in the same condition as in No. 4 mine, if you never saw it operated there?

A. I set up the engine, and knew its condition. I knew the condition it was in.

Q. You saw the engine after it was set up?

A. Yes, sir.

Q. And you set it up yourself?

A. Yes, sir; with the exception of the connecting wires and things like that. The electrician does that, and some little outside things.

Q. How long was that before the accident?

(Testimony of Nate H. Drummond.)

A. That I don't remember. I don't remember just what time it was; but I know it was quite a little while before the accident.

Q. Were you working for the company at the time of the accident? A. No, sir.

Q. How far was this engine located from the main entry, or the entrance into these slants, where the miners were at work?

A. The engine itself was right beside the track in the main entry, and possibly thirty or forty feet, I guess, from the switch. I could not say exactly how far it is.

Q. Was it in full view of persons passing back and forth in going to and from work in those slants?

A. Yes, sir.

Q. This light that was placed there, was that sufficient to show the parts of the engine?

A. Not having seen the lights, I couldn't say; I couldn't answer that question.

Q. On your direct examination, you testified about some lights being placed over the head of the operator there.

A. There was one light in there when I was there, if I remember right. They become smoked in the mine, though, and one thing and another, and get dirty and smudged up, and they are not very particular in cleaning them, and sometimes they get pretty dirty.

Q. To return to my question, was the light that you have testified about as being there sufficient to show the parts of the engine?

(Testimony of Nate H. Drummond.)

A. I should judge so, if the light was kept clean and not changed. You see they change them around, as they need them in the work.

Q. Assuming, then, that the light was where you saw it put, and was in good condition, could a man see the drum of the engine? A. Yes, sir.

Q. And these various levers that you have testified about?

A. That depends. The light there varies quite a lot. When the motor is pulling a heavy trip, and the big electric hoist is running, your lights will go down pretty dim, until there is just a red streak there in the globe.

Q. You don't think, then, that a man running this machine could see the machine at all, by reason of the quality of light that was there?

A. Well, that is owing to where the light was placed. If the light was placed over the engineer's head, where it should be, when I was in there he could see.

Q. Mr. Drummond, you have testified about a light being there. You know where that light was, don't you? A. Yes, sir.

Q. Now, tell us about that light. Assuming that that light was burning, and was in its ordinary position, over the head of the operator, could he see the parts of the machine?

A. A man could see; yes. If it was burning and clean, a man could see.

Q. And he could see these levers?

A. Yes, sir.

(Testimony of Nate H. Drummond.)

Q. How far away from him would they be when he was standing in position to operate the levers?

A. He would be standing within reach of each lever, reaching one lever with his left hand, and the other with his right.

Q. Ordinarily, how far would he be from the drum of the engine?

A. He would stand within about three feet probably of the drum.

Q. Would he be above it, or on the same level, as the drum was operating?

A. He would be on about the same level, as he was standing there.

Q. How far would he be from this brake that you have described, or the treadle of the brake?

A. He would be standing right over the brake. Here would be the brake by the left foot here, and the lever connecting with the water barrel would be right here, and the other left would be right here. His foot is right here, ready for the brake; his left hand is on one lever, and his right hand is on the other. (Illustrating.)

Q. Now, this timber around the treadle that you think was there would leave the treadle in a kind of box, would it not?

A. It left it in a kind of space between the two timbers. You see, the ends of these cross-timbers project over the frame, the timbers that run lengthways with the engine, and the motor sets on the ends of those two timbers. (Indicating.)

(Testimony of Nate H. Drummond.)

Q. How far would the man be from this revolving uncovered cog-wheel when he was standing there prepared to throw the machine in or out of gear?

A. Standing there in the proper place, he would be within about a foot and a half, I should judge.

Q. Standing above, or on the same level?

A. About on the same level.

Q. About how far is the uncovered cog-wheel from the treadle of the brake?

A. About the same distance; about a foot, or a foot and a half.

Q. About a foot?

A. About a foot, or a little over.

Q. Is it to the left or to the right of the brake?

A. To the left.

Q. Standing there with his left hand on the controller lever? A. Yes, sir.

Q. And putting his foot on the brake treadle, the exposed cog-wheel would be revolving about a foot away from him, upon the left side?

A. Yes, sir; or a foot and a half; such a matter.

Q. Could a man standing there see this revolving cog-wheel if the light was burning in its usual condition? A. I should think so; yes, sir.

Q. Now, the operation which you have described was the ordinary operation of that machine, as it was there placed, was it not? A. Yes, sir.

Q. That is the way it was operated every time it was operated by anybody? A. Yes, sir.

Q. That is all.

(Testimony of Nate H. Drummond.)

Redirect Examination.

(By Mr. C. B. NOLAN.)

Q. You stated, I believe, in answer to a question propounded by Mr. Day that in the operation of the machine there, the controlling lever would be handled by one hand? A. Yes, sir.

Q. And the lever that would have to do with the electricity would be handled by the other?

A. Yes, sir.

By Mr. DAY.—The two levers you have asked about are one and the same. The controller lever is the one that operates the electricity.

Q. Then besides the controller lever, there would be another lever that would have to be operated to handle the drum? A. Yes, sir.

Q. That is right in front? A. Yes, sir.

Q. That would operate the drum?

A. Yes, sir.

Q. Now, about operating the treadle, where would a man have to be looking, in the operations there, in order to know when the car got up?

A. He would have to be watching the car when it got on the knuckle at the switch.

Q. So that, he would have to have his hands on the levers, he would have to have his foot on the brake, and he would have to have his eyes on the cars? A. On the cars. Yes, sir.

Q. Now, would he be looking behind him or in front of him, in order to have his eyes on the cars?

A. He should be looking in front of him.

(Testimony of Nate H. Drummond.)

Q. Do I understand that the movement of the cars was an important matter as affecting his own safety, or that it was a trifling matter?

A. Well, the movement of the cars was a part of the matter affecting his own safety, also.

Q. Because of this coupling arrangement on the end of the rope? A. Yes, sir.

Q. That is all.

Recross-examination.

(By Mr. DAY.)

Q. Did you ever see one of those ropes fly back into the machine, Mr. Drummond?

A. Yes, sir.

Q. When?

A. That was several years ago, at the mine operated by the old Park Coal and Coke Company.

Q. Where?

A. In No. 5 mine. At that time it was called the Old Horse.

Q. Was it before or after the rope had been uncoupled from the car that it flew back?

A. It was after it had been uncoupled from the car.

Q. In this operation, did they uncouple the rope from the car before the car ceased running?

A. In some places they do; yes, sir.

Q. I am speaking of this particular occasion that you have testified about. At the time this car was pulled up on the knuckle, was the rope uncoupled before the car stopped? A. Yes, sir.

(Testimony of Nate H. Drummond.)

Q. Then there wasn't any necessity of stopping the machinery at all? A. Why not?

Q. Because the car had already stopped.

A. The end of the rope went into the machine and tore the machine all to pieces. The engineer failed to turn it off in time.

Q. Did you ever see that done there?

A. I was there myself and helped to repair the engine.

Q. No. I am not referring to that occurrence now. I mean, did you ever see that done with this engine? A. No, sir.

Q. Did you ever hear of it being done?

By Mr. NOLAN.—To which we object as not proper cross-examination.

(Argument by counsel for the respective parties.)

Objection overruled.

A. Not with this particular engine we are speaking of.

Q. Do you know whether or not the rope had been uncoupled from the car at the time Kovec attempted to put his foot upon the brake?

A. No, sir; I do not.

Q. It could not fly back until it was uncoupled, could it? A. Not very well.

Redirect Examination.

(By Mr. NOLAN.)

Q. Would it be possible to have it occur in the case of this engine after the rope was uncoupled?

(Testimony of William England.)

A. It could be possible; yes, sir.

Q. That is all.

Witness excused.

[Testimony of William England, for Plaintiff.]

WILLIAM ENGLAND, called and sworn as a witness in behalf of the plaintiff herein, testified as follows:

Direct Examination.

(By Mr. NOLAN.)

Q. What is your name, Mr. England?

A. William England.

Q. Where do you live? A. Aldridge.

Q. In whose employ are you at the present time?

A. The Montana Coal and Coke Company.

Q. That is the defendant in this action?

A. Yes, sir.

Q. In what capacity are you employed by them? What are you doing for them? A. Driving.

Q. How long have you followed the business of driving?

A. About two years and a half, I guess, or something like that.

Q. You were in the employ of the company, then, in the month of September, 1907? A. Yes, sir.

Q. And you were working in the capacity of driver then? A. Yes, sir.

Q. When you say you are driving, what do you mean by that?

A. Hooking a mule on to some empty cars, and taking them inside to wherever you want to take them, I guess, and taking loads out.

(Testimony of William England.)

Q. Do you have anything to do there, except to direct the movements of the mule?

A. I have to get off and sprag the cars if they are going down a pitch.

Q. Where do you leave the mule when you are going down the pitch? A. In front of the cars.

Q. You take the mule down with you?

A. Yes, sir.

Q. So that, in performing the duties of a driver, you are constantly operating with the mule, are you?

A. Yes, sir.

Q. Do you ever leave the mule for the purpose of handling any of these engines?

A. Yes, sir, sometimes.

Q. Sometimes?

A. Yes, sir. You do sometimes if you have got an engine in the place where you are driving.

Q. In the mines, as they are operated, does the mule do all the pulling? A. Yes, sir.

Q. How about coming up the slope?

A. That pitch they have been talking about?

Q. Yes.

A. It is not much of a pitch. It is just about like that (indicating.)

Q. On the levels the mule does the working or pulling, and on the slopes, something else does the work, does it not?

A. The engine does the work on the slopes.

Q. What I have referred as slopes are called slants, in mining parlance, are they?

A. Yes, sir.

(Testimony of William England.)

Q. Now, you say that when the cars are being pulled over the slants or up the slants, the engine does the work? A. Yes, sir.

Q. In that instance, who is it that gives his attention to the engine?

A. The driver does that.

Q. The driver does that?

A. The driver does at this place.

Q. During the time that the driver is giving his attention to the engine, who, if anybody, has charge of the cars that are moving up the slant?

A. At some places there is a rope rider, and in some places there is not. Where there is a rope rider, it would be especially for that.

Q. When you speak about a rope rider, what have you reference to? Does he ride on the rope?

A. He rides on the cars and the rope.

Q. At the end of the rope? A. Yes, sir.

Q. When the cars *gets* out of the slope or out of the slant, and *gets* on to the level, what, if anything, is done by the rope rider?

A. He cuts the rope off the cars, and lets them run down to a certain place, and stops them.

Q. How are they stopped? By a brake?

A. No; by a sprag. A sprag is a piece of wood about so long (indicating), with a sharp point on it.

Q. In the event that there is not a rope rider, then whose duty is it to stop the cars?

A. The man who comes up with them. If there don't happen to be anybody there, some man who is in the company work does it.

(Testimony of William England.)

Q. Of course, as the operations were carried on there, there would have to be somebody always with the cars while they were moving? A. Yes, sir.

Q. And there should also be somebody in the engine-room operating the engine?

A. Yes, sir.

Q. Now, do you know where this engine upon which the plaintiff was injured was located?

A. Yes, sir.

Q. Where was it in the mine?

A. In the second slant, they called it then.

Q. In the second slant? A. Yes, sir.

Q. Some distance below the surface of the ground?

A. It was in the ground quite a ways. It was in under the ground, beneath the ground.

Q. Was there any sunlight getting in to where the engine was located?

A. No, sir; there was not.

Q. How long had you known that engine there in that place? That is, while it was used for the purposes that we have referred to.

A. Ever since it has been there.

Q. How long has that been?

A. I couldn't exactly say.

Q. Now, do I understand that there is a driver for every engine there is in the mine?

A. Well, there is a regular engineer for some of them, and in some places, where there is not so much to do, the driver does it.

(Testimony of William England.)

Q. That is, there is an engineer in some places where there is a lot of work to be done with the engine? A. Yes, sir.

Q. And in place where there is not so much work, you say, it is done by a driver?

A. Yes, sir; if there is one there.

Q. Did you ever know of the work being done there by anybody else other than the driver or an engineer?

A. I don't know. I think they did on night shifts. Sometimes there was a driver, and sometimes there wasn't.

Q. Of course, if there was not a driver there, and if there was not an engineer there, and it became necessary to operate the engine, it would have to be operated by whom?

A. By the fellows who were working there.

Q. Do you know whether they were engineers or not? A. No, sir.. I don't.

Q. You were not an engineer, were you?

A. I wasn't altogether one. I have had some experience with them.

Q. You have had some experience?

A. I have run them lots of times.

Q. Do you think that it requires any experience to operate one of those engines?

A. You have got to be shown how to run it all right.

Q. What do you say?

A. You have got to be shown how to run it. I know I did.

(Testimony of William England.)

Q. Now, were you the driver in this particular slant where this particular engine was operated?

A. There was two drivers there. There was one driver off that day, but I was supposed to be there that day, I guess. The other driver was out hunting.

Q. The other driver was out hunting?

A. Yes, sir.

Q. Did you yourself have occasion to use that engine that day before the accident? A. Yes, sir.

Q. About how many times?

A. Either four or five times. I don't remember exactly. About four times, I guess.

Q. Who was your rope rider?

A. Jerry Milautz.

Q. He was a witness who testified here yesterday? A. Yes, sir.

Q. Where was it that you got the cars that you handled? A. The empty cars?

Q. Well, either the empties or the fulls. You let down the empties and pulled up the fulls, didn't you?

A. Yes, sir; we got the empty cars out at the parting, and let them down the slant, and took the loads out.

Q. I wish you would explain to the Jury how you operated this engine, in connection with the movement of those cars?

A. You had to take the clutch out and put your foot on the brake, when you let them down.

Q. You say you take the clutch out. That is a new term to me. What is the clutch?

(Testimony of William England.)

A. That is a thing on the engine that you use to pull the cars up.

Q. Now, we will say that you have to put in the clutch, and also operate the brake; what will that do?

A. If you have to throw the clutch, that is to pull the loads up.

Q. Where do you get the power?

A. When? To let them down?

Q. Yes; or at any time.

A. We don't have any to let them down.

Q. But when you bring them up, you have to have some power, don't you? A. Yes, sir.

Q. Where did you get the power? What kind of power was it? A. Electricity.

Q. Where did you get the power?

A. There is a little tub there with water in it, and we have an iron running into it, and then we have a piece of steel, that is kind of V-shape, and you put that down into the tub, and it starts.

Q. That is, when the piece of steel touches the water, there is a connection? A. Yes, sir.

Q. When you want to shut off the power, what do you do? A. Lift that handle up.

Q. Lift it up? A. Yes, sir.

Q. How was that engine lighted that morning of the accident? A. With electric light.

Q. How many electric lights were there?

A. Well, there was one. There is a piece of board that goes across above there, and there is a bulb on that board. I could not say whether it was on the front of the board or not; but I think it was.

(Testimony of William England.)

And then there was another one on the side, so that you could see when the cars come up over the knuckle.

Q. When you speak of the light on the side, was that intended to give light to the fellow who was operating the machine?

A. No, sir; that was supposed to be so that you could see when the cars came up over the knuckle.

Q. So that you were dependent upon how many lights to give you light when you were operating the machine?

A. Well, there was one there at the machine, and one so that you could see when the cars come over the knuckle.

Q. About how far apart were those two lights?

A. About thirty feet, I guess, or thirty-five.

Q. You speak about the light being up above the machine, or in the ceiling. Is that what I understood you to say? About how high was the ceiling, or how high was the light? How high was it above your head?

A. It was about as high as I am, I guess. It was about as high off the ground as I am when I am standing up.

Q. You know where you were standing there working that machine that day, don't you?

A. Yes, sir.

Q. How far away from you would the light be?

A. It would be right in front of me; in front of the belt; the post is across here (indicating), and the

(Testimony of William England.)

belt is right here, and the light is in front of that pole or board.

Q. Is it a kind of a bulb light?

A. It was just like that light (indicating electric bulbs in chandelier in courtroom). It was a 16 or 32 candle power; I don't know which.

Q. Do you know whether it was perfectly clean in there or not, or whether there was any dust or smoke around?

A. If you had a heavy trip on it, it would pull the light down quite a ways; you could just see a little red streak in the globe. It wouldn't shine so bright.

Q. That was not the question I put to you. You misunderstood me. What I want to know is whether or not there was any dust in that passageway, any coal-dust? A. I never saw it.

Q. Do you know whether this bulb was cleaned every morning or not?

A. No; I never cleaned it every morning. I never seen it cleaned either.

Q. Do you know whether it was dirty or perfectly bright on this occasion? A. I don't remember.

Q. You don't remember that. Now, going to the light itself, do I understand that there was a gradation in the light, or a change, under different conditions?

A. Yes; when you had a heavy trip on there was a change; it would pull the light down.

Q. It would pull the light down?

A. Yes; it wouldn't shine so bright as it would if there wasn't any trip on.

(Testimony of William England.)

Q. When the light was pulled down, as you say, what effect would that have on your ability to see things around you?

A. You couldn't see. I could see, because I had on a big driver's light, so that I could see without the electric light.

Q. You had a driver's light, so that you could see how it was operating? A. Yes, sir.

Q. You had it right there by you?

A. It was on my hat.

Q. You had a light on your hat?

A. Yes, sir.

Q. Supposing you did not have a light on your hat, while you were in there operating the engine, and the light was diminished on account of the increased consumption of the power, then what would be the effect?

A. You couldn't see so good without a light.

Q. Did the person who was operating the machine have anything at all to do with looking after the cars that were coming up?

A. Well, he had to watch the cars. He had to notice when they came over the knuckle, so that he would see when to shut the engine off.

Q. Why should he be concerned about the cars? Why shouldn't the rope rider attend to them?

A. The rope rider is not running the engine. The rope rider has to cut the rope off the cars.

Q. After the rope is cut off, what becomes of it?

A. Well, the man at the engine shuts the engine off.

(Testimony of William England.)

Q. If the drum kept on revolving, what would be the result? A. The rope would keep coming.

Q. And if it kept coming, what would it do?

A. It would come on over.

Q. Do you know whether there was any iron on the rope or not?

A. Yes, sir; there was a coupling on the rope.

Q. Was there any danger attendant upon that rope coming on, as you have stated?

A. If it would hit you, there would be.

Q. And if it hit you, what would it do?

A. It would be liable to hurt you.

Q. So that, really, then, when you were operating the engine there, to what matters did you have to give attention?

A. Well, you fixed the engine first, and then you had to give attention to the cars when they were coming up.

Q. Did you have to use your hands at all?

A. Yes, sir. You had to use one on the clutch, and one on the lever.

Q. Did you have to use your feet?

A. Yes, sir; one foot for the brake.

Q. Did you have to use your eyes?

A. Yes, sir.

Q. What would you be using your eyes upon?

A. Watching the cars.

Q. Now, going to the brake itself, as it was there that morning, will you tell us its location?

A. It was underneath. You had your foot down on it like that (illustrating). It was underneath.

(Testimony of William England.)

Q. Underneath? A. Yes, sir.

Q. Do you know whether there were any timbers near it? A. Yes, sir; I do.

Q. What character of timbers were they?

A. I don't know what you would call them. They were big two by fours like. About that wide (indicating), I guess; about twelve inches, I guess.

Q. In operating the engine, where were you standing with reference to where the brake was, and with reference to the space caused by those timbers?

A. Standing right in them. There was one across there, and one in back there, and one along the sides like that (illustrating).

Q. So that you were in a kind of a box, were you?

A. I was standing right here (illustrating).

Q. As to the brake itself, what kind of a piece of mechanism was it?

A. It was a piece about that wide (indicating), I guess; and it ran out that way (indicating). I never looked at it much.

Q. Was it wider than the sole of a man's shoe?

A. Not much wider, if it was any. Just about the size, I guess, of a man's shoe; about the size of your shoe.

Q. Do you know whether or not it was perfectly still there that morning?

A. No; it kept shaking when the trip was coming up—when it was pulling on the engine.

Q. It kept shaking? A. Yes, sir.

Q. Did you see any gearing there?

A. Yes, sir.

(Testimony of William England.)

Q. Where was the gearing, with reference to where you were standing?

A. Right on the side, on the left-hand side.

Q. Could you tell us whether that tradle or that brake was so constructed there, or was of such a character that you miss it or slip on it?

A. Well, I guess if you would slip on it, you would be liable to fall.

Q. If you did fall, where would you fall with reference to the gearing?

A. You would fall into them; I guess. There is two of them there—either on the right side or left side.

Q. What would you say as to whether or not, in your judgment, that gearing, as it was there, was reasonably safe?

A. It was not if you would fall. It was safe if you were standing up.

Q. There is no doubt about that. But, in the light of the fact that you might fall, what would you say as to whether or not, in its exposed condition there, it was reasonably safe?

A. No, sir; it was not.

Q. About how far away was the gearing from the man who stood there operating the machine?

A. It would be about like this (illustrating).

Q. About a foot or two away from him?

A. Yes, sir.

Q. Now, then, where were you about ten o'clock on the day of this accident?

(Testimony of William England.)

A. I was inside, with a trip, in the third slant. There is another slant inside of this one.

Q. Do you know where the plaintiff was working that day?

A. He was working in the back entry there. I guess that is what they call it. It is where the air came in at.

Q. About how many feet was that away from you, or away from where the engine was, or from the top of the slant?

A. It was about thirty-five feet from the engine to where you started into it. I don't know how far he was in that place.

Q. Do you know what character of work he was doing in there?

A. He was doing company work.

Q. Was he digging coal, or what was he doing, if you know?

A. He was cleaning this place out.

Q. Did you yourself that morning take any cars from where he was?

A. I don't remember of taking any from him.

Q. Now, then, about how far away were you from the engine about the time that he was injured? You recollect about the time that he was injured, do you?

A. Yes, sir. About 3,500 feet.

Q. And you were there for what purpose?

A. Getting another trip inside.

Q. That is, getting cars? A. Yes, sir.

Q. To bring out? A. To bring outside.

(Testimony of William England.)

Q. Do you know where your rope rider was at that time?

A. He must have been riding rope for Andy.

Q. When you speak of Andy, you have reference to the plaintiff? A. Yes, sir.

Q. Now, then, how long would it take to go from the engine to where you were, for the purpose of getting those cars?

A. It would take about five minutes, I guess, to get in there.

Q. How long would you be in making the trip until you got back to the engine again?

A. Fifteen or twenty minutes.

Q. You would be gone fifteen or twenty minutes. In the case of taking cars after you got them out of the slant, and taking them toward the surface, how long would you be gone on a trip of that kind, before you would return again?

A. Oh, maybe half an hour.

Q. Half an hour. Do you remember getting to the engine soon after the plaintiff was injured?

A. Yes, sir.

Q. Had he been taken away from there when you got to the engine? A. Yes, sir.

Q. He was not there when you got to the engine, was he? A. No, sir.

Q. Who was there then?

A. Well, Jerry Milautz came inside and told me about it.

Q. What he told you would not be competent. I am asking you who was there at the engine when you got there, if anybody? A. Nobody.

(Testimony of William England.)

Q. What, if any, evidence did you discern there as to any accident having taken place?

A. Jerry told me about it.

Q. I mean, after you got to the engine, did you see any evidence at all of an accident having occurred there?

A. After Jerry told me about it, I went to the engine and I took his fingers out of there.

Q. You took some of his fingers out of there, did you? A. Yes, sir.

Q. What fingers?

A. These two fingers (indicating).

Q. Where was Andy at the time you took his fingers out? A. He had gone out.

Q. He went out, and left his fingers behind in the cogs, did he? A. Yes, sir.

Q. That is all.

Cross-examination.

(By Mr. DAY.)

Q. How long had you been running the engine in that place? A. I ran it that morning.

Q. No; I mean how long had you run it altogether in that place?

A. I don't think I worked there before that. I was working inside in another slant. There was another driver there.

Q. How long had the engine been in this place?

A. I don't remember how long it had been there.

Q. Do you remember whether it had been there only two or three days before, or whether it had been there a long time?

(Testimony of William England.)

A. Oh, it had been there longer than two or three days. It had been there quite a while.

Q. You say you never ran the engine before that day?

A. I might have run it when the drivers were off. I forget.

Q. You don't remember whether you ever ran it before that day?

A. Oh, I ran it before that. But I don't know how many times.

Q. Do you remember whether you ran it the day before the accident? A. Yes, sir; I did.

Q. What shift were you working on?

A. The day shift.

Q. When did you go to work?

A. Well, you started about half past six, left the barn at fifteen minutes to seven, and got in there about seven.

Q. How long did you work?

A. Until half past three.

Q. During that time how many loads a day would you take out of that slant?

A. Sometimes thirty; sometimes twenty-five.

Q. How many people were working in that slant the day of the accident, if you know?

A. It was either eight or ten; I am not sure which.

Q. Eight or ten? A. Yes, sir.

Q. How many cars of coal would those eight or ten people mine during an eight hour shift?

(Testimony of William England.)

A. They would mine all they could get.

Q. How many cars would they usually mine? How many cars do you think they would mine?

A. Oh, about eight; eight or ten. Eight or ten, I guess.

Q. From eight to ten cars?

A. For two men.

Q. Each set of two men would mine from eight to ten cars? A. Yes; if they got them.

Q. How many cars had you taken out of that slant before the accident?

A. I don't exactly know.

Q. You say you think you ran three or four trips?

A. Yes, sir.

Q. Had anybody else been running the engine that morning except yourself? A. No, sir.

Q. Was there anybody else in the habit of running it except yourself when you were there?

A. Sometimes they did; yes, sir; not if I was there. They did not run it if I was there.

Q. Well, who else would run it?

A. There was a fellow there by the name of Mat Windsor; he used to run it.

Q. Was he a driver or a miner?

A. He was supposed to be a miner.

Q. Do you know whether or not Jerry Milautz had ever run it? A. Yes, sir; he had.

Q. Had he worked with you very long?

A. He was the rope rider for that slant.

Q. You say he was the rope rider for that slant?

A. Yes, sir.

(Testimony of William England.)

Q. The rope rider stayed on the slant all during a shift, did he?

A. He stayed up on top of a slant, or down the slant.

Q. I mean, he stayed in the vicinity of that slant all day? A. Yes, sir.

Q. And you went wherever it was necessary around that entry to haul cars out, did you?

A. Yes, sir.

Q. You were hauling cars from other slants besides this one, were you not?

A. I did that day; the other driver wasn't there.

Q. When there are two drivers there, each has particular slants in which he works?

A. Yes, sir. There was a driver short that morning. He couldn't get two drivers that morning.

Q. So that you were the only driver who was there on hand that day? A. Yes, sir.

Q. But Milautz could pull those cars up with the engine himself, could he not?

A. He could if he wanted to, I guess.

Q. You don't know whether he did or not?

A. No, sir.

Q. You have seen him pull them up?

A. Oh, yes; he has pulled them up.

Q. Now, just show the Jury how you would start the engine to pull the cars up. Just stand up the way you would stand when operating the engine.

A. The engine was about like this, and the slant was over there, and there was a clutch over here. You had to put this clutch in, and put your hand over

(Testimony of William England.)

here and get that lever, and put it down into the water, and the engine would start. (Indicating.)

Q. Now, then, the engine would be started, and would run, and you would hold on to the levers?

A. Yes, sir.

Q. When you wanted to stop the engine, what would you do?

A. I would let loose of that lever.

Q. That is, the controller lever?

A. Yes, sir.

Q. You would let go of that? A. Yes, sir.

Q. What would you do with the *clut?*

A. You would push it out if you could. You couldn't do it when the engine was running; I know I never could do it. Some might do it.

Q. Then, what was done with the brake?

A. You put your foot on it.

Q. What was that done for?

A. To stop the engine from running. You do that for lowering the cars, and when you want to stop the engine.

Q. Could you stand right in one place and put your foot on the brake?

A. Well, if you were standing over this way further, you would have to move over to put your foot on it.

Q. It was right there readily accessible? You could do it, could you not?

A. Yes, sir; you could do it.

Q. You had let go of the controller lever, had you not, at this stage of the operation?

(Testimony of William England.)

A. Yes, sir.

Q. Could you see the cog-wheel operating there?

A. Yes, sir,

Q. How far away from you was it?

A. Just about that far (indicating).

Q. How long had you operated an engine before the day of the accident?

A. I don't know; I never kept track of it.

Q. Well, was it a long while or just a little while?

A. It was quite a while.

Q. Did you see Kovec there that morning?

A. Yes, sir; I did.

Q. At what time did you see him?

A. Well, I should judge about half-past eight. I don't know.

Q. Where was he?

A. He helped me lift a car on the track.

Q. You didn't see him at work in the slant?

A. No, sir.

Q. He was working in the air-course was he?

A. I don't know what you call it. I guess it was an air-course. The air came in there.

Q. He was not mining coal that forenoon, was he?

A. No; he was cleaning that place up, but he might have been mining coal. He was loading coal.

Q. But he was not employed that morning as a regular miner. He was working at what is called company work, was he not? A. Yes, sir.

Q. What is the difference between company work and other work?

(Testimony of William England.)

A. The coal miner gets paid for the amount of work he does, and the others work for the company, and get regular wages.

Q. The miner just mines the coal and puts it in the car, and gets paid for the work he does?

A. Yes, sir.

Q. And the rope rider take the car with the coal away? A. Yes, sir.

Q. Did you have any talk with Andrew that morning?

A. I don't remember whether I talked with him or not.

Q. Who was with Andrew when he helped you to lift the car on the track? A. His partner.

Q. What car were you putting on the track?

A. An empty car.

Q. That they were going to use?

A. I don't know whether it was going there, or somewhere else. This car that they helped me to lift was up on the main entry. I don't know where it was going.

Q. What did you do with it after you got it on the track?

A. I left it there at the slant.

Q. That was about eight o'clock in the morning?

A. It might have been later; I don't remember.

Q. How long before the accident happened had you been running the engine?

A. Since seven o'clock.

Q. I mean how long before the accident was it that you had last run the engine?

(Testimony of William England.)

A. Just one trip before that.

Q. Well, how many minutes?

A. Maybe half an hour, and maybe not so long.

Q. Didn't you say a little while ago that it was about five minutes before this?

A. That I ran it?

Q. Yes.

A. I said five minutes after I left there. I had just left there.

Q. You had just left the engine when the accident happened? A. Yes, sir; to go inside.

Q. You had been away about five minutes?

A. No, I left there about five minutes, I guess, when it happened, but I had to get my trip.

Q. You had been at the engine about five minutes before the accident happened?

A. I guess it was about that. He just pulled the car up when I was going inside.

Q. You had been in and around that slant all the morning before the accident, had you not?

A. Yes, sir.

Q. And you hauled loaded cars out of this No. 3 slant, did you not?

A. No, sir; just that one trip; there was no driver there, I told you.

Q. You said you had hauled some that morning?

A. Just after the trip when I went in there, there was supposed to be two drivers there, and there wasn't.

Q. Didn't you say that you had hauled some coal that morning out of that No. 3 slant?

(Testimony of William England.)

A. No, sir; I said a trip.

Q. Where did you haul that coal from that you hauled that morning?

A. From the second slant.

Q. How far was the second slant from the air shaft where Andrew was working?

Q. I guess it was right there.

Q. You mean right there in the neighborhood?

A. Yes, sir.

Q. How many loaded cars had you hauled from slant No. 2 that morning?

A. I don't know. I don't remember.

Q. Well, about how many? Was it two or ten?

A. More than two.

Q. Was it as many as ten?

A. Maybe twice ten.

Q. How many times had you operated the engine, if you remember?

A. I don't know. Two or three or four trips.

Q. You had practically been running the engine all the morning, had you not, from seven o'clock up to the time that he got hurt? A. Yes, sir.

Q. That is all.

Redirect Examination.

(By Mr. NOLAN.)

Q. You say there was one driver short that morning in that portion of the mine? A. Yes, sir.

Q. How did you know that?

A. Because there was always two there before.

Q. Who was the foreman there? Who was the fellow who was directing things?

(Testimony of William England.)

A. Louis Testovarsnik.

Q. Did you have any talk with him that morning?

A. I might have been talking to him. I think he was going to drive the mule himself that morning, or one of the mules.

Q. How do you know he was going to drive one of the mules himself?

A. Because he was telling me about it.

Q. Telling you that he was to act as a mule driver?

A. Just that day; he said he couldn't get anybody else.

Q. About what time in the morning did you have that conversation with him?

A. Well, at seven o'clock he saw the other driver wasn't around.

Q. Now, you told Mr. Day that you saw Mr. Windsor running the engine. Do you know how it was that he came to be running the engine, whether he was directed to do so by anyone or not?

A. I don't know; he was the one who showed me how to run it, when I first ran it.

Q. You also said something about Jerry Milautz being able to bring those cars up the slant himself, and also being able to run the engine?

A. He could pull the cars up if he was running the engine, but if he was down at the bottom, he couldn't run them up very easy.

Q. But I understood you to say that he could do the two jobs at the same time,—that is, pull the cars up, and also run the engine.

(Testimony of William England.)

A. No, sir; he couldn't do that.

Q. You stated, did you not, in answer to Mr. Day's question, that Jerry Milautz could pull the cars up by himself. I believe that was the question that was put to you by Mr. Day?

A. He could; yes; if he was up at the engine; but he couldn't if he was down at the bottom of the slant. He could run the engine all right if he was up there.

Q. What did you mean by saying, in reply to Mr. Day's question, that he could pull them up by himself? Did you mean that he could handle the entire thing himself? A. Yes, sir.

Q. That he could take care of the cars, and bring them up that slant, and also operate the engine, and bring the cars to a standstill, while operating the engine? A. No, sir; I don't mean that.

Q. Two men were necessary to do all those things, were they not? A. Yes, sir.

Q. You said on cross-examination you had never been able to pull the clutch out on that engine?

A. I never have; no. Maybe some of the others could do it; I never could.

Q. When you speak about pulling the clutch out, what do you mean?

A. I could pull it out after the engine was stopped; but not when it was going; not when the juice was on—not when the drum was turning around.

Q. You speak about juice. What have you reference to? A. Electricity.

(Testimony of William England.)

Q. When the clutch was not pulled out, what effect did the gearing have upon the drum?

A. It would keep turning around. The whole thing would keep turning.

Q. But, if you were able to pull the clutch out, then what effect would it have?

A. Just the gearing would turn.

Q. The gearing would turn? A. Yes, sir.

Q. Without affecting the drum at all?

A. No, sir.

Q. What I am desirous of finding out is how the gearing would turn after you got the juice off, as you call it, or after you got the electricity off?

A. It would be going with such force that when it stopped, the drum would keep on going around.

Q. That is to say, that after the cutting off of the power, the machinery would continue in operation for some time from the momentum?

A. Yes, sir.

Q. With the movement of the gearing affecting the drum, what would you say as to whether it would be easy or more difficult to stop the drum?

A. Well, it would be just the same, I guess. If you had your foot on the brake, it might stop, and if you didn't, it would not stop. But if you had the clutch out, it would keep going in that way; you couldn't stop it.

Q. Do I understand that the pressure required to stop the drum would be the same, whether you had to do with the drum by itself, or whether you

(Testimony of William England.)

had to do with the drum jointly with the gearing and the machinery attached to the gearing?

A. It would be harder to stop with the gearing going than it would with just the drum going.

Recross-examination.

(By Mr. DAY.)

Q. Do you remember whether you worked there in that slant the day before the accident?

A. Did you say it was the 27th of September when he got hurt?

Q. Yes. Did you work there on the 26th?

A. Yes. I think I did.

Q. No; I think the accident was on the 23d of September. Did you work there on the 22d of September, the day before that?

A. Yes, sir; I think I did.

Q. Did you work there on the 21st of September, two days before the date of the accident?

A. I don't know. I know I worked there on the 22d.

Q. On the 22d, were there two drivers there?

A. Yes, sir; there was.

Q. Who was the other driver?

A. My nephew.

Q. What was his name? A. Robert Ralph.

Q. Where was he at the time of the accident?

A. I think he was driving in the slope at that time; I don't know.

Q. Was he one of the regular drivers around the mine there at that time? A. I think he was.

(Testimony of William England.)

Q. Where was Louis Testovarsnik at the time of the accident?

A. I don't know where he was. He was going to drive one mule, if he was there. He said he was going to drive one of the mules. I never saw him.

Q. Did you see him after he told you that he might have to drive one of the mules that morning?

A. I saw him in the morning, and then he went to do something, and I didn't see him any more.

Q. From seven o'clock to ten in the morning, you didn't see him any more? A. No, sir.

Q. He was not directing you as to these various slants from which you were to haul coal, etc.?

A. He told me in the morning where to go.

Q. Did he tell you about going into this air-shaft and hauling any waste out of there?

A. I didn't need to go down there. I got them out of the slant.

Q. As long as they were out in the slant, you took them?

A. Yes, sir; if they were out in the entry, I took them.

Q. If Kovec and Strubel had set a car out in the entry there, you would have taken it, would you not?

A. I would have taken it outside. I wouldn't know where it came from.

Q. That is all.

Witness excused.

(Noon recess.)

[Testimony of Sol Poznanski, for Plaintiff.]

Two o'clock P. M.

SOL POZNANSKI, called and sworn as a witness in behalf of the plaintiff herein, testified as follows:

Direct Examination.

(By Mr. NOLAN.)

Q. Mr. Poznanski, what is your name?

A. Sol Poznanski.

Q. What is your business?

A. The insurance business.

Q. For how long a time have you been in the insurance business? A. Twenty years.

Q. In the life insurance business?

A. Yes, sir.

Q. What do you say as to whether or not there are standard mortality tables issued by insurance companies, upon which annuities are predicated?

A. Yes, sir; we have mortality tables.

Q. Showing what the expectancy of life is?

A. Yes, sir.

Q. What is the life expectancy of a man thirty years old?

A. At the age of what, did you say?

Q. Well, we will put it at 29.

A. Thirty-four years and ninety-nine days.

Q. What is the expectancy of a man at the age of thirty?

A. Thirty-four years and thirty-four days.

Q. Now, what sum of money would be required to purchase an annuity for a man having a life expect-

(Testimony of Sal Poznauski.)

ancy of thirty-four years and ninety-nine days, who had an earning capacity of one hundred dollars a month—that is, to give him one hundred dollars a month—and the annuity payable annually, we will say?

A. Payable annually. That is, he would have to pay the company this amount in one lump sum, and he would receive the annuity annually. At the age of twenty-nine, for every one hundred dollars he would receive annually, he would have to pay $1,922.70.

Q. That is for every one hundred dollars pay him annually for the balance of his life?

A. For every hundred dollars he was to receive annually; yes, sir.

Q. If he was to receive twelve hundred dollars annually, how would you ascertain the amount?

A. It would be just twelve times that.

Q. Twelve times nine hundred dollars?

A. Twelve times $1,922.70.

Q. Kindly figure what that amount would be, and give us the aggregate amount.

A. $23,072.40.

Q. Now, then, if instead of the sum of twelve hundred dollars being paid annually, the sum of one hundred dollars is paid monthly, would the amount required to purchase the annuity be greater or less?

A. It would be greater.

Q. Greater. Can you tell us about how much greater it would be where the installments would be

(Testimony of Sol Poznanski.)

payable monthly, rather than the sum total payable annually?

A. Most of the insurance companies pay annually, or semi-annually, or quarterly, and they figure on the quarterly basis as the smallest.

Q. Will you tell us how much it would cost to buy such an annuity, payable quarterly?

A. $1,964.00 for each one hundred dollars.

Q. That is, if the payments were made quarterly?

A. If they were quarterly payments.

Cross-examination.

(By Mr. DAY.)

Q. What do you mean by mortality tables, Mr. Poznanski?

A. A mortality table is a table based on the general average of ages at death in any country. They have been found by experience to be about correct, and upon it all life insurance tables are based.

Q. You don't mean that if a man is twenty-nine years old at a given time, he will live thirty-four years thereafter, do you?

A. Oh, no. That is simply the general average.

Q. On how many lives are those tables figured?

A. On a basis of one hundred thousand lives.

Q. That is, out of one hundred thousand people, the chances are that those who reach the age of twenty-nine will live thirty-four years more?

A. That is the idea; yes, sir.

Q. What tables are you using?

A. The American Mortality Table.

Q. Who is the maker of that table?

(Testimony of Sol Poznanski.)

A. It is compiled by all the insurance companies, and they all use the same table practically.

Q. Is that the same table that is used by all standard insurance companies? A. Yes, sir.

Q. Do those tables vary perceptibly?

A. Very little. There is another table, an English table, called the Carlyle table; that is a little different, but very little; not enough to figure on.

Q. Supposing a man were earning seventy-five dollars a month, what would be the rate?

A. $17,304.30.

Q. That is all.

Witness excused.

Mr. NOLAN.—The plaintiff rests.

Mr. DAY.—The defendant now moves the Court for a nonsuit on the ground that the plaintiff has failed to establish the case, as pleaded, and has failed to establish any ground of liability on the part of the defendant in this, (1) that the evidence fails to show that the plaintiff was repuired to operate the engine at the time he testifies he operated it, and (2) that if it could be held that he was required to operate the engine at that time, the evidence is uncontradicted as to the point that the dangers from the operation of the engine with an exposed cog-wheel were obvious and ordinary, and were such as were assumed by the plaintiff, and that whatever statement was made to him by the foreman would not waive such assumption of responsibility.

(Continued argument and discussion by counsel for the respective parties.)

(Testimony of Louis Testovarsnik.)

The COURT.—The case is not very strong for the plaintiff, but it is strong enough, I think, to compel the court to overrule the motion at this time. The motion is denied.

Mr. DAY.—Note an exception.

DEFENDANT'S CASE.

[Testimony of Louis Testovarsnik, for Defendant.]

LOUIS TESTOVARSNIK, called and sworn as a witness in behalf of the defendant herein, testified as follows:

Direct Examination.

(By Mr. DAY.)

Q. Tell the jury your name.

A. Louis Testovarsnik.

Q. Where do you live? A. In Aldridge.

Q. How long have you lived there?

A. I went there nine years ago the ninth of May.

Q. Where were you born?

A. I was born in Austria.

Q. What business are you engaged in at Aldridge at the present time?

A. At the present time I am mine foreman.

Q. For what company?

A. For the Montana Coal & Coke Company.

Q. Where were you employed on the 23d day of September, 1907, the day of the accident we have been talking about? A. I was at that place.

Q. How long had you been working for the Montana Coal and Coke Company?

A. I have been working for them for over eight years.

(Testimony of Louis Testovarsnik.)

Q. What was your business on the 23d day of September, the day of the accident?

A. My business was foreman.

Q. Foreman. What were your duties as foreman? What were you required to do?

A. I went through the rooms in the morning to see if they were all safe, etc., and when the men came in, I told them where to go, to different places in the mine, and told them whether the places were all right or not.

Q. You told them what to do each day?

A. Yes, sir; and told them what to do.

Q. From whom did you get your orders? Who was the man over you at that time?

A. Mr. Magraw.

Q. How many men did you have working under you? A. There was pretty close to fifty men.

Q. Do you know the plaintiff, Andrew Kovec?

A. Yes.

Q. How long have you known him?

A. I couldn't tell you exactly; but I have known him for several years; about six or seven years.

Q. Has he been working there for the company during all the time that you have been there?

A. I think he has.

Q. What was he doing during this time?

A. He was working in the mine. Sometimes he was digging coal, and sometimes he worked on Company work.

Q. He sometimes worked at company work, you say? A. Yes, sir.

(Testimony of Louis Testovarsnik.)

Q. What do you mean by company work?

A. That is work that is paid for by the day, and digging coal is contract work.

Q. When men are working for the company, they do whatever they are told to do around the mine?

A. Yes, sir; they work wherever the boss or mine foreman sends them. They know they have to go wherever the boss or mine foreman sends them.

Q. On the day of the accident, what was Andrew Kovec doing?

A. He was cleaning up an old air-course, where the air traveled through to supply the mine.

Q. He was cleaning up this old air-course?

A. Yes, sir.

Q. Was there any coal in there?

A. Well, it was kind of mixed up with rock; it was caved ground; there was coal and rock together.

Q. Was he doing company work, or was he working as a miner?

A. Yes; he was doing company work; he was paid by the day.

Q. Where did you first see him on that day, if you remember?

A. I saw him going in first about five minutes before seven o'clock.

Q. What was he doing at that time?

A. He had just come in. I had a certain place, where I sat down on a tool-box, and waited on the people as they go in. It is at a place where there is an inside double track, a double parting. I saw him there.

(Testimony of Louis Testovarsnik.)

Q. Where was this tool-box from the engine? How far away from the tool-chest was the engine?

A. Four or five hundred feet; or something like that.

Q. Was that out toward the entrance to the mine, or in the mine?

A. The engine was inside.

Q. And this was nearer the entrance than the engine, was it? A. Yes, sir.

Q. You sat there, so that you could see all the men who work under you pass in? A. Yes, sir.

Q. Do you give them their directions as to where they shall go at that time as they go in?

A. Yes.

Q. Now, on this occasion on the morning of the accident, who, if anybody, was with Andrew when he came in?

A. I can't remember now who was with him that morning. They generally come in one man at a time, and ask, "How is my place?" and I tell them where to go. The company men ask, "Shall I go to the same place where I was yesterday, or shall I go some place else?" I tell them to go some place else if I want them to go there to fix it up, or I tell them to go anywhere that I want them to go.

Q. On the morning of the accident, when you saw the plaintiff just before seven o'clock, did you give him any instructions at all for that day, as to where he should go, or what he should do?

A. I just told him, "Go to the same place where you was yesterday."

(Testimony of Louis Testovarsnik.)

Q. Had he been working in that air-shaft before?

A. Yes, sir.

Q. How long had he been working in that place?

A. As near as I remember, it was about two weeks; or pretty nearly two weeks.

Q. Who was working in the air-shaft with him?

A. Frank Strubel.

Q. Who was engaged in hoisting these cars with this engine on that day?

A. William England.

Q. Who was helping England in that work?

A. Jerry Milautz was helping him. He was a rope rider.

Q. Were they both there on duty that day?

A. Yes.

Q. Did you give Kovec any instructions about using the engine?

A. I don't remember so much. I never did give him any instructions on it, I remember. I remember that I never did give him any instructions to run the engine that morning.

Q. Did you ever instruct him to run the engine at any time?

A. Gentlemen of the Jury, that is one thing that I can't remember of; I can't remember; it is too long ago. If it was a month or so ago, I could remember, but it is so long ago that I can't remember. A fellow can't remember so many things. I can't remember.

Q. Did he ever run an engine for you?

(Testimony of Louis Testovarsnik.)

A. I couldn't tell you about this here engine; I never seen him run this engine that he got hurt on; but I seen him run another engine at another slant.

Q. What engine was that?

A. It was a little different engine than this.

Q. Whereabouts was it?

A. About five hundred feet or so from the other one; it was in a different slant; it was No. 1 slant, as we called it at that time.

Q. What did you call it? A. No. 1 slant.

Q. You say he did run an engine there?

A. He did run an engine there.

Q. How long did he run that engine?

A. That is one thing I can't explain any further. I 'know that much, that I seen him run it once or twice; that is all I could say.

Q. Did you ever seen him running this engine that he was using the day he got hurt?

A. No; I never seen him; only that one time that he got hurt is all. That is the only time.

Q. Do you know whether or not he was running it before that day?

A. That is something I couldn't tell you.

Q. You have no knowledge of his ever having run that engine, have you? A. No, sir.

Q. When did you next see Kovec after he went into the mine that morning?

A. I had been in the first slant to see some fellows working in there, and I came out of the first slant and I was going into the second slant, and I went past where the machine was, and he was just

(Testimony of Louis Testovarsnik.)

hoisting a trip, and I passed away. I passed through there and was only about ten steps, as near as I could tell, from the engine when I heard him holler, and I jumped back there as quick as I could, because I thought he must have got hurt, or something, and I found him with his hand in the gearing. Jerry Milautz was there, too; he had cut off the cars, and run over to Andrew.

Q. Did you see Andrew running the engine immediately before he was hurt?

A. I seen him running it as I passed by there, and I didn't see how it was.

Q. How long was that before he hollered?

A. Just about two or three seconds; just while I took about eight or ten steps away from the engine. The cars from the slant came up to the flat; they just came up to the flat, and I stepped away past those cars, and took about eight or ten steps from the engine, and at that time I heard him holler, and I jumped back there right away. That is the way it was.

Q. When you got back to the engine, where was he?

A. I just started looking around there to see what I could get to help him out; but I didn't think it was so badly smashed as it was.

Q. He was in the engine when you got back there, was he?

A. Yes. And finally we got a piece of draw bar from the car, and me and Jerry Milautz pried with that, so that we could get his hand out.

(Testimony of Louis Testovarsnik.)

Q. Did he say anything at the time that you took him out of this engine about using the engine?

A. When I took him from there, I gave him a little tea to drink; he was feeling kind of bad. I said, "Poor Andrew, I am sorry for you"; and he said, "Yes; that was an unlucky day for me." He said, "Look, I ran that other machine before, and I never did have no trouble with it"; and I said, "Well, we can't help it now; we have to take what comes to us." I said I was sorry myself for poor Andrew.

Q. Where was Billy England at this time, if you know?

A. William England was on the way inside with the cars, to get a load.

Q. How long before the accident had he been there operating the engine?

A. William England? I couldn't tell you that. I was not around there. I couldn't tell you that.

Q. Had you been there during the morning and seen anybody operate it?

A. No; I was in the first slant. You see, I couldn't be there right along. I went into the first slant to see how the men were working, and I just came around out of there, and there was a few places inside this slant where men were working, and I was going to go in there, go around to the second slant, and then it was that this happened.

Q. How long had that engine been run there in that place?

A. As near as I could tell you, it must have been running there about nearly three months, or some-

(Testimony of Louis Testovarsnik.)

thing like that; I couldn't tell you exactly, but it was something like that.

Q. Did you make any examination of it to see whether or not it was in good running condition?

A. I generally did. Every morning I turned it around a few times so that I could see that there was nothing wrong with the electricity. I thought sometimes there might be, and I had orders from Mr. Magraw to do that.

Q. State whether or not there was anything wrong with the engine that morning.

A. I tried the engine, and I couldn't see anything wrong. It was in the same condition as it was before, when it was put up.

Q. Were there any lights around there?

A. Yes, sir; there was two lights there.

Q. Where were the lights?

A. One was right above the engine, and the other one was about ten or fifteen feet from it, or something like that, as near as I could tell you now.

Q. How long had this engine been used in the mine, not at that particular place, but used in the mine?

A. That was the only time that I knew it was used. I heard that it was used in No. 4, but I don't know how long it was used up there. I was up in a different mine. In that place where I was, it was about three months or pretty nearly three months before the accident.

Q. Did you hear Frank Strubel testify in this case yesterday? Did you hear him testify?

(Testimony of Louis Testovarsnik.)

A. Yes, I did.

Q. Did you hear Strubel say that you told him and Andrew that they would have to pull the cars up when the driver was not there?

A. Yes; I heard him say so.

Q. State whether or not you told them anything of that kind that morning?

A. No; not that morning.

Q. Did you ever tell him that?

A. Before?

Q. At any time.

A. At any time before, I did not. It is so long ago, you know, that I can't remember.

Q. Did you ever hear of their using this engine before? A. No; I never heard.

Q. Did you see Strubel with Kovec that morning at all? A. With Kovec?

Q. Yes.

A. I couldn't tell you. I don't know whether they came there together that morning, or whether one at a time passed me, asking for orders. I couldn't tell you as to that now. I don't remember.

Q. Did you have any talk with the two of them together that morning, anywhere in that mine?

A. No; not before the accident.

Q. How many men were there working in that slant that morning?

A. As near as I could tell you, there must have been from eight to ten men. That is all that generally work in there.

Q. How much coal would eight to ten men ordinarily mine in that place?

(Testimony of Louis Testovarsnik.)

A. In a good run, they usually mine from thirty-five to forty cars; sometimes a car, or two or three cars over that.

Q. Thirty-five to forty cars to the shift?

A. Yes, sir.

Q. What have you to say as to whether or not one driver could haul those cars up during the eight hour shift? A. Oh, yes.

Q. Do you know how many cars had been hauled up before the accident happened?

A. No; I don't know.

Q. That is all.

Cross-examination.

(By Mr. NOLAN.)

Q. How long have you been in the United States?

A. In the United States. I have been in the United States nine years past the ninth of May, 1908.

Q. How much of that time have you been in the employ of the defendant company? How much of that time have you been working for the Montana Coal & Coke Company? A. Between that time.

Q. How many years have you been working for that company?

A. I was away from there only once for six months, and all the rest of the time I have spent up there.

Q. That is to say, after you came to the United States, you went to work for that company, and you have been working for the company all of the time since, outside of six months when you were away?

(Testimony of Louis Testovarsnik.)

A. The first five and a half months after I came here, I worked in Minnesota, and after that I went up there, and I have been here ever since, except when I was away once about six months.

Q. You have told us about being absent about six months? A. Yes; six months.

Q. So that with the exception of the six months that you were absent, and the five or six months that you worked in Minnesota, you have been working for the defendant company ever since you came to the country?

A. I worked first in Minnesota, and then I left here once, and was away from here six months.

Q. About how many years have you been foreman?

A. It is a little over three years now.

Q. And before that time what were you doing for the company?

A. When I first came here I was digging coal, and after that I worked most of the time on company work.

Q. That is to say, when you were engaged in company work, you were getting paid so much a day?

A. Yes; so much a day; I was paid by the day.

Q. And when you were digging coal, you were simply working under a contract?

A. Yes, sir; at so much a load. The more we dig the more we get.

Q. Now, do I understand that there is more than one foreman down there, or more than one boss, or did you have charge during the last three years of all the underground workings?

(Testimony of Louis Testovarsnik.)

A. No; just at one place; just in what we call the straight.

Q. That is, you had charge of the straight entry?

A. Yes.

Q. And you had complete control of all of the men who were working in that department, didn't you?

A. No.

Q. Who did?

A. I only had a right to tell them where to go to work, and to give them orders as to the work, and so on, and if there was anything else, Mr. Magraw was over me.

Q. What was there besides that that Mr. Magraw would have to see the men about?

A. I didn't hire any men or fire any men; Mr. Magraw done that.

Q. You did not hire any men, did you?

A. No.

Q. Or fire any?

A. No; I didn't have the authority.

Q. You didn't have that authority at all?

A. No.

Q. But, of course, if a man didn't obey your orders, and you reported the matter to Magraw, the man was fired?

A. Yes; it would be so in anything like that.

Q. Now, was there anything else in connection with the work carried on in your department there that Magraw interfered with, outside of the hiring and discharging of men?

(Testimony of Louis Testovarsnik.)

A. If anything happened around in the mine,—if a fellow would not do this and that that I wanted him to do, and that I told him to do, I would say to him, "If you don't like it, you can go and see Magraw." That is all I had to do with it.

Q. How often did Magraw go into the mines?

A. He went in pretty often. The first two years when I came into that position, I worked in the straight, and he came in there pretty often.

Q. That is to say, he went in there, because you were not in there; because you were outside?

A. No; I was always inside.

Q. You were the foreman? You were the boss?

A. Yes.

Q. How recently before the 23d of September, 1907, was it that you saw Magraw in there?

A. I didn't see him before that accident that day. I saw him the day before that.

Q. Where did you see him the day before?

A. I saw him in the entry, right where you walk along in the face of the entry.

Q. What was he doing?

A. He came in to see how things were coming along; to see if we were doing right or not.

Q. What men did he go to see?

A. To see me.

Q. No; not you; but of the other men, the men who were working under you there?

A. He came in to see every—

Q. (Interrupting.) No; I am not asking you about that. Will you tell me some of the men that

(Testimony of Louis Testovarsnik.)

he went in to see at this time, on the day before this accident, besides yourself?

A. Well, he comes in, you know, very often.

Q. Yes; I know that; you have already told us that. But will you tell me some of the men? There were eighteen or twenty men working there, as I understand it.

A. Well, Magraw came in—

Q. (Interrupting.) Yes; Magraw came in. Now, we have gotten that far; and will you tell us to what man or to what bunch of men he went when he came in?

A. I couldn't tell you what man. It is too long ago. I can't remember about that.

Q. You can't remember about that?

A. No; I can't.

Q. Now, will you tell us what direction he gave to any man in the mine that day, to your knowledge?

A. No; I can't tell.

Q. Why can't you?

A. Because I can't think to say whether he ever did say anything to anybody or not.

Q. As a matter of fact, you were the man who did the saying, weren't you? You were the man who directed the men in there? A. Yes, sir.

Q. You told them where to go to work?

A. Yes, sir.

Q. And told them what to do? A. Yes.

Q. He didn't have anything to do with that, did he?

(Testimony of Louis Testovarsnik.)

A. No; he only sent me a man sometimes when I needed such a man for such a work, for rock work, or as a miner.

Q. Now, then, as I understand it, as the mine was operated there, there was a slant going down from the engine? A. Yes.

Q. And the mining operations were carried on through drifts from that slant, as you went down? Is that right?

A. I can't hardly understand what you mean.

Q. Where did you get the coal?

A. Well, I got the coal from that slant; from the first slant, and second slant; and inside we have got some rooms.

Q. Did you run into the ground in any direction from the slant? A. Yes, sir.

Q. What did you do that for?

A. For to get coal out.

Q. Certainly. To get coal. A. That is it.

Q. So that the coal that you took out of those chambers, or those rooms was taken out from ground on either side of that slant?

A. It was taken outside of that slant about five hundred feet.

Q. About five hundred feet?

A. To the double trap. We call it the parting; double trap. The driver brings it out to the slant, and the motor takes it up; the driver takes out the loads.

(Testimony of Louis Testovarsnik.)

Q. What do you call those passageways that lead from the slant to the rooms where you get the coal? Do you call them entries?

A. We call them entries.

Q. Entries or levels?

A. We call them entries.

Q. Now, then, how many slants did you have control of on the 23d day of September?

A. We had three slants. The first, second and third. I can't remember of the third slant, though. We stopped once at that time, and I don't know whether the third slant was working at that time or not.

Q. Who was bossing the first slant?

A. I was bossing the first slant. That was the only place we were getting coal out of; the first and second, and two or three rooms on this side; so that if the driver was going in and got some loads and took them over to the engine, and then he went out and got some other cars, and hitched them—

Q. (Interrupting.) No; I simply asked you who had charge of the first slant. A. I did.

Q. Who had charge of the second slant?

A. I did.

Q. Who had charge of the third slant?

A. I did.

Q. Now, were there any other bosses there, except you, who had charge of the operations that were carried on under the ground there?

A. No; only when there was something wrong, I reported it to Magraw.

(Testimony of Louis Testovarsnik.)

Q. So that you were the only boss there?

A. Yes.

Q. That is, underground? A. Yes.

Q. Now, then, did you have a hoisting engine at No. 1 slant? A. Yes.

Q. Who was running that?

A. At the time of the accident Johnnie Koheegan ran that engine. John Koheegan ran that engine at the first slant.

Q. He was an engineer, was he not?

A. He was sent in as an engineer.

Q. He was constantly in the engine-room? He didn't do anything else except run the engine, did he?

A. No; he helped them to push the empty cars back. He ran the loads out, and he helped them to run the empty cars back; that is all he did.

Q. Was he a driver, as well as engineer?

A. No; he didn't drive.

Q. Now, in No. 2 slant, in which the engine was located on which the plaintiff was injured, as I understand it, was there another engine?

A. No; there was only one engineer.

Q. I am not talking about engineers. I say, was there an engine for the No. 2 slant, in addition to the engine in No. 1?

A. Yes; there was an engine there.

Q. And there was also an engine for the No. 3 slant, was there? A. Yes.

Q. Which slant was it where the plaintiff got hurt? A. The second slant.

(Testimony of Louis Testovarsnik.)

Q. Who was running the engine at the No. 3 slant? A. The driver.

Q. Who was he?

A. William England ran it sometimes, and sometimes the slant men. When the slant was working, the slant men ran those cars out.

Q. How many drivers did you have at the No. 3 slant? A. There was two drivers.

Q. For each slant?

A. No; for the whole business.

Q. That is, there were two drivers for No. 1 and No. 2, and No. 3 slants?

A. No. 1 slant did not need any driver. It was right there at the double track. They didn't need any driver at the first slant.

Q. Now, Billy England was the driver in the second slant?

A. Yes, sir. There was two drivers before; but very often we were short of drivers. Sometimes we only had one driver, the same as it was the day Andrew got hurt we had only one driver that day.

Q. You were short of drivers that day, were you?

A. I think so.

Q. You think so? A. Yes.

Q. Do you know?

A. I couldn't state for sure. There was only Billy England driving a mule that day, I think, and I am pretty sure I was short a driver.

Q. Don't you know that you talked with Billy England that day, and told him you didn't have a

(Testimony of Louis Testovarsnik.)

driver, that you were a driver short, and that you yourself would have to act as driver that day?

A. Maybe I did.

Q. Maybe you did? A. Yes.

Q. You didn't act as driver, did you?

A. I forget. .

Q. You forget?

A. Yes; I don't remember.

Q. Do you mean to tell us that, with this circumstance occurring, you don't remember whether you acted as driver that day?

A. I know I told England that he was to hoist out of that second slant. I remember that yet. But I don't remember whether we were short a driver that time, or whether we had stopped one driver already. I am pretty sure we were short a driver.

Q. Then, if you were short a driver, there would be some interference with the progress of the work, would there not, unless you made some provision for the shortage?

A. You were kind of short of men, too, on the inside, and we didn't have much to do, and I just let him be alone. I did sometimes help him myself. He would generally bring the mule whether we were short a driver or not, and sometimes I helped to make a trip myself.

Q. Sometimes, when there was a shortage of drivers there, you would get the men working for the company to handle the engine, would you not?

A. Yes; but lots of times you couldn't get men for driving.

(Testimony of Louis Testovarsnik.)

Q. I know; but when a driver was absent, and when you were short of men, you would sometimes go for men working for the company, and ask them to help the driver out?

A. Yes; I done that, too.

Q. You did that? A. Yes, sir.

Q. So that, there isn't any reason why you should not have gone to some of the men this morning, when you were short a driver, to get them to help you out in connection with the operation of that engine, is there? A. I don't know.

Q. What is that?

A. I don't know how that was.

Q. Don't you know, as a matter of fact, that the plaintiff and Strubel were only forty or fifty feet away from that engine that morning?

A. Yes; they were not very far from the engine.

Q. And they were the nearest men to the engine, were they not? A. Yes; they were.

Q. And they could be gotten to the engine quicker and without loss of time, could they not?

A. Yes; they could be gotten to the engine nearer than anybody else around there. That is a fact.

Q. Of course, you knew that the plaintiff used to run the engine before, didn't you? You saw him run another engine?

A. I saw him run the other engine at the first slant, but I never saw him run this engine at the second slant. But at the first slant I saw him.

Q. Then will you tell us why it was that you should not ask him, he being close to the engine

(Testimony of Louis Testovarsnik.)

there, and you being short a man, to help you out? Why should you not ask him to do that that morning? You would be likely to do that, would you not?

A. I don't know how that can be.

Q. You would be likely to do it, would you not? He was there only fifty feet away from the engine. You say you had seen him run an engine before. You were short a man. There wasn't any reason why you should not get him to do that work, was there?

A. Well, it was this way: When they got more loads during the day than the driver could handle, I went in with a mule to help him out, and at that time I was down on the slant, and I came by there about ten o'clock—

Q. (Interrupting.) You are wandering off from the subject. You knew, didn't you, at seven o'clock in the morning that you were short a man to act as driver? A. I guess I knew; yes.

Q. Now, quit guessing, and tell us, if you know. Do you know whether you were or not?

A. Gentlemen, it is just so: What I remember surely, I will tell you exactly and true; but I can't remember it altogether, and I would not say that I did see it and that I know it. That is one thing I do say, that I don't know it.

Q. In the light of the condition of your recollection, why do you tell us that you had or didn't have this talk with the plaintiff that he says you did? Why do you say that? A. What talk?

Q. The talk that Kovec says you had with him, in which you told him to run that engine. How can

(Testimony of Louis Testovarsnik.)

you say, in the light of your recollection, that you didn't say this to the plaintiff: "If the engineer or driver is not there, you can pull the cars up yourselves, as you can go faster in that way ahead with your cleaning." Will you swear that you didn't tell him that? A. Yes.

Q. Why will you swear to that, in the light of the condition of your recollection?

A. He came in and asked me about a place, and I told him, and I never seen him since.

Q. This was when he came in that he says you had this conversation. How do you know that you didn't say that to him?

A. Sometimes the driver is late in coming in; sometimes they were later than the other men; and sometimes they were early, too; sometimes the driver was late.

Q. Did you know that morning that you were going to be short a driver that day?

A. I didn't know at that time when Kovec left.

Q. You didn't know at that time, did you?

A. I didn't know when Kovec was there; afterwards they told me he was not there.

Q. When was it that you were advised or that you learned you were going to be a driver short?

A. I was just thinking if it was so. I was just thinking if there was a driver short; I don't know, I told you, whether there was any driver short or not.

Q. So that, really, you don't remember whether there were two drivers there that day or not?

(Testimony of Louis Testovarsnik.)

A. Really, I don't remember.

Q. You don't remember? A. No.

Q. And you don't remember having had a talk with England, to the effect that one of the drivers was away hunting, and that you yourself would have to drive a mule? You don't remember having that talk?

A. Sometimes when they had a driver, you know, they would send me two mules, and sometimes I would help him out. He fetched both mules in. I remember that. That was before that accident. He fetched the other mule in, just the same as when there was two drivers. He fetched two mules in, and one mule, you know, was standing there half the time or more, and sometimes I would go in and take that mule, and help out.

Q. My question is, do you remember having a talk that morning, the morning of the accident, with England, and telling him that you were short a driver, and that you yourself would have to act as a driver, if you didn't get somebody?

A. I don't know if I did or not. It is just this way: Lots of things happen, and a fellow can't remember.

Q. England was not a driver in that No. 2 slant at all, was he? A. He was.

Q. He was the regular driver there.

A. He was more as an inside driver before, but for the last few days, I know that he did work there. I remember that well; that he did run that hoisting

(Testimony of Louis Testovarsnik.)

engine out of that second slant, and he did that same day of the accident.

Q. You remember sitting in that entry that morning, do you, when the men came in at seven o'clock? A. Yes.

Q. What time did you get to the entry?

A. What entry is that?

Q. Well, perhaps, I may have called it by the wrong name. I have reference to the place where you were sitting. What time did you get there?

A. I got there about twenty minutes to seven.

Q. Twenty minutes to seven? A. Yes.

Q. Now, I understand that it was a portion of your duty, was it not, to go through the mine there, and see whether there was any gas or not?

A. Yes; I got to the box at twenty minutes to seven; but I had been through the rooms already before that.

Q. That is to say, you went to the mine early in the morning, for the purpose of going through the different chambers? A. That is it.

Q. To see whether there was any gas?

A. That is it; yes.

Q. And you had made that tour of the mine, and got back to the box about twenty minutes to seven?

A. Yes; as near as I can tell.

Q. Who was it that put the plaintiff to work where he was working at cleaning out the air-course, and also getting the coal that might be there?

A. Magraw gave me that order, to put men like that in there. Kovec was working there nearly two

(Testimony of Louis Testovarsnik.)

weeks, and that morning, when he came in, I told him to go to the same place.

Q. With reference to the day of the accident, when were you last in that place where he was working?

A. That was about six o'clock in the morning.

Q. That is, you were in this place where he was cleaning out this air-passage at six o'clock in the morning?

A. I was every place where work was going on before any men had come in.

Q. How soon before seven o'clock was it that you saw the plaintiff go in?

A. As near as I could tell, it was five minutes to seven.

Q. How many men had gone in before him, or had anybody gone in before him?

A. I couldn't answer that.

Q. What did you say to the man who followed him, and who was that man?

A. The man that followed him?

Q. Yes. A. Sometimes, you see—

Q. (Interrupting.) No; we will get to this particular time. Who was the man who followed the plaintiff, and what direction did you give him?

A. I don't know who followed him first, whether it was Frank Strubel, or somebody else. There was more of them going inside, one after another, and I don't know who was following him.

Q. Now, as the men were going in there, you were giving them directions, were you not?

(Testimony of Louis Testovarsnik.)

A. Yes.

Q. Will you give us the names of some of the men who were working there that morning, outside of the plaintiff and England, and the man who was working in that air entry with the plaintiff?

A. If I think of it, I can.

Q. Well, try and think.

A. In the same slant was Concilious, Frank Concilious.

Q. Do you know whether Concilious went in before Kovec did?

A. He went in the same direction, to the same slant, but I don't care whether he went in ahead of him or behind him.

Q. Do you recollect what you said to Concilious?

A. Yes.

Q. What did you tell him?

A. That his place was all right. He asked me how was his place, his chamber, and I said, "All right." They generally say it like that.

Q. Are you answering that he said that because they generally say that, or because Concilious asked you that morning if his place was all right?

A. You see, they were working in there, and in the second place was Tony Sites. He is a fellow that is not here now—

Q. (Interrupting) You have gotten away from the question, but we will pass that. Do you recollect when you saw Billy England that morning?

A. I don't know whether I saw him before Andrew went in or after Andrew went in?

(Testimony of Louis Testovarsnik.)

Q. I am not talking about Andrew now. We will pass him for the present. Do you recollect when it was that you saw Billy England?

A. I saw him; yes.

Q. There where you were sitting?

A. Yes.

Q. Do you remember whether it was before or after seven o'clock?

A. Well, it was pretty close to seven o'clock, either way.

Q. But you couldn't tell us whether it was before or after you saw Andrew?

A. No; I couldn't tell you.

Q. What talk did you have with Billy?

A. Well, the drivers I never had much talk with. Billy is a driver.

Q. What talk did you have with Billy himself there? A. I can't tell.

Q. Of course you can't tell us whether you were short a man there or a driver that day or not?

A. Whether I was or not is one thing I couldn't tell exactly.

Q. Who was the regular driver there?

A. I think, if I am not mistaken, it was Jack Forsythe.

Q. Do you remember whether you saw Jack Forsythe that day or not?

A. I think it was before that Jack was there. If I could see the books, I could explain that.

Q. We haven't the books. We are depending upon your recollection.

(Testimony of Louis Testovarsnik.)

A. It is too long ago. I can't remember.

Q. At any rate, you didn't do any driving that day yourself? A. That day?

Q. That day. The day of the accident.

A. I don't know. I don't think I did.

Q. Now, if there was a man short there, you would try to fill his place, would you not?

A. That is it; that is the reason, that I don't know whether we had two drivers at that time or not. That is one thing that is a little too long ago for me to remember. If I knew that such questions were to be asked, I would have found out about it from the books; but that is one thing I can't say.

Q. You will not have to go very far to answer this: if there was a driver absent, you would be likely to get somebody to fill his place would you not?

A. If there was anybody there that could drive, then, I would put them on.

Q. Of course, if there was a driver absent, and there wasn't anybody there to fill his place, it would be an interference with the work, to some extent, would it not, in connection with the movement of the cars, and the operation of that engine?

A. It was a little slower work; that is all.

Q. A little slower work?

A. A little slower work.

Q. Now, do I understand that you were around there just about the time of the accident?

A. Well, I just came from the first slant, when I went through down there, and seen how things were going on down below.

(Testimony of Louis Testovarsnik.)

Q. Did you go by this engine?

A. By this engine; yes, sir.

Q. And, as I understand you, you saw Andrew at the engine?

A. I saw him run it; yes.

Q. You were not surprised at that, were you? You were not surprised to see him there, were you?

A. No.

Q Why didn't you go to him and ask him why it was that he left his work, and was there monkeying with the engine? Why didn't you say that to him?

A. I was thinking that he must know how to run it. He had helped out, and I was thinking he must know how to run it, because I had seen him run the engine at the first slant before, and I thought maybe he could run this engine, too, and I just walked away. I didn't say anything.

Q. If, as you say, you didn't know but what there were two drivers there, and you sent this man to work in his entry, and afterwards saw him away from his work, and doing something else, why didn't you go to him and ask him why he was not at his work?

A. I didn't go to him, and I didn't say anything.

Q. I am asking you why you didn't. Why didn't you? A. I can't answer that.

Q. Don't you know that you didn't because you told him that morning that he should help you out, on account of the absent driver, in the matter of running that engine?

A. Who do you say I said that to?

(Testimony of Louis Testovarsnik.)

Q. To Andrew? A. No.

Q. You are sure about that?

A. Yes; I am sure about that. If I wanted him to run that engine, I would go into the place where he was, and tell him after that to help out, but I was not at his place after I seen him at seven o'clock.

Q. Why couldn't you tell him that at seven o'clock just as well as you could afterwards, if you learned at seven o'clock that there was a driver absent that day?

A. I could tell him; yes, but I didn't.

Q. You didn't? At any rate, you were not surprised at all when you saw him there running that engine at ten o'clock?

A. Well, it didn't surprise me, you know. I seen him there, and walked away, and that is all.

Q. Did you talk with him at that time?

A. No.

Q. How close to him did you get?

A. About three feet from him. The engine was right alongside of the track, alongside of the entry, and I was walking along the entry. That is as close as I was to him.

Q. Do you know whether he saw you?

A. I don't know whether he did see me; no.

Q. It was light enough there?

A. Yes; there was lights there.

Q. Do you know whether the engine was running at the time or not?

A. Yes; the engine was running.

Q. The engine was running? A. Yes.

(Testimony of Louis Testovarsnik.)

Q. Do you know whether the cars had gotten up to the knuckle before you got away from there?

A. The cars just started to come over the knuckle when I passed there; they just came up to the knuckle.

Q. You say that you went some little distance beyond, and then you heard a scream?

A. Yes; the cars just came over, and I took about eight or ten steps away from the engine, and then I heard him holler.

Q. Then you rushed back?

A. Yes; then I rushed back.

Q. And he was caught in this gearing?

A. Yes; he was caught in that gearing.

Q. Who else got there about that time that you did? A. Jerry Milautz and Frank Strubel.

Q. Do you remember seeing Frank that morning when he went into work?

A. Yes; I remember seeing Frank.

Q. I thought you said on your direct examination that you didn't see him.

A. Which Frank? Frank Strubel?

Q. Yes. Didn't you say upon your direct examination that you didn't remember seeing him?

A. I remember seeing him, but I don't remember whether he was ahead of Andrew or behind him. That is what I said.

Q. Don't you remember stating on your direct examination that you didn't remember seeing Frank Strubel that morning, in response to a question put to you by Mr. Day?

(Testimony of Louis Testovarsnik.)

A. Well, I seen him, but I don't know whether he was ahead of Andrew or after him.

Q. You don't remember whether he was ahead or behind? A. No.

Q. When you saw Kovec that morning when he was going in while you were sitting there, what was the conversation you had with him? What was the talk that you had with him?

A. Nothing except to tell him to go to the same place. He asked me, "How is the place?" and I said, "All right." We didn't say anything else.

Q. What talk did you have with Frank?

A. About the same. He always asked me, "Is it all right"? "Yes." There was nothing else; nothing at all.

Q. That was what all of them asked, was it?

A. Yes, that is what all of them asked.

Q. Did you give him any directions at all as to the work?

A. Well, they knew how to do it themselves. They had worked there before. They just had to go ahead and timber the place up, you know. He knew it was his duty to do it.

Q. You didn't give him any directions, did you? You didn't tell him to do any particular thing?

A. No particular thing; no.

Q. You say that after he was injured, you ran up there and you used some kind of an iron bar, as I understood you, for the purpose of getting him loose. That is, you meant for the purpose of getting his hand out?

(Testimony of Louis Testovarsnik.)

A. Yes; Jerry Milautz helped me to get him out, and then we took him out, and gave him some tea; he was feeling bad, you know.

Q. You left some of his fingers in the gearing, didn't you?

A. There was some fingers dropped down. Some of the fingers dropped right out, when we got the hand out. The fingers, some of them, dropped down out of the gearing, down on the bottom.

Q. He was suffering quite a good deal of pain, then, was he not?

A. He was feeling bad, all right. Yes; he was suffering all right.

Q. You took him some little distance away, and gave him some tea to drink? A. Yes.

Q. Now, what was it that you said to him?

A. I said, "Poor Andrew." I said, "I am sorry for you, Andrew"; and he said "Jesus Christ," he said, "this is an unlucky day for me," and he said, "Look how I ran that other engine sometime before"—(Interrupted).

Q. What is that?

A. He said, "I ran that other engine sometime before, and I never had no trouble with it," *He* said. I said, "Well, we can't help it; I am sorry. I am sorry for you."

Q. Now, what he said was that he had run the other machine but that nothing happened? Isn't that what he said?

A. That is what he said. He said, "Look how I run that other machine," and he said, "I never yet did have any trouble."

(Testimony of Louis Testovarsnik.)

Q. What did you say then?

A. I said, "Well, I can't help it. I am sorry." That is all I said, "I am sorry, Andrew."

Q. You told him that he had to get what was coming to him, didn't you? A. No.

Q. You said, did you not, in detailing this conversation before, "We can't help it now; we have to take what is coming to us"?

A. What is coming to us. We can't help it sometimes when we get into an accident sometimes.

Q. That is what you said? "We can't help it now. We have to take what is coming to us."

A. Yes; I said, "We can't help what comes, like accidents."

Q. Now, you say that you saw him run one of those engines before, did you? A. Yes.

Q. Where? A. At the first slant.

Q. That is where the engineer, Koheegan, was employed constantly, is it?

A. That was before the engineer was there.

Q. How many times did you see him run it?

A. I seen him run it a couple of times.

Q. How close were those times to each other?

A. I couldn't tell you that exactly. I know that I seen him a couple of times.

Q. About how long before the time when he was injured?

A. It was quite awhile before that.

Q. Quite a while is rather indefinite. Can't you get it any closer than that? Was it a year or two years before?

(Testimony of Louis Testovarsnik.)

A. No; it was not so long; it was maybe five or six months; that is as near as a fellow could get to it.

Q. About five or six months. Do you know where he was working then, or what he was doing?

A. I don't know what place he was working in down in that slant?

Q. He was working under you, was he not?

A. He was working at company work somewhere down there; yes.

Q. Do you know whether he was directed by anybody to run that engine at that time?

A. Yes, I guess so. Whoever was working down in that slant run their own engine, you know.

Q. That engine was entirely different in construction to this one, was it not?

A. There was a difference; quite a bit of difference. It was worked with water like this, but a different clutch.

Q. In that engine, there was simply a pressing against a button or some kind of a projection in order to get the power on? A. On that other one?

Q. Yes; in No. 1.

A. They started it with the power on the same principle as this one was; only the clutch was different from this altogether.

Q. At any rate, you knew, of course, from the fact that you saw him run the engines before, that he was skilled about the matter, and knew about engines, and could run them?

A. He was a good, practical miner, and he was put in a place like that where they need such a man.

(Testimony of Louis Testovarsnik.)

Q. What did you say then?

A. I said, "Well, I can't help it. I am sorry." That is all I said, "I am sorry, Andrew."

Q. You told him that he had to get what was coming to him, didn't you? A. No.

Q. You said, did you not, in detailing this conversation before, "We can't help it now; we have to take what is coming to us"?

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Q. Yes; in No. 1.

A. They started it with the power on the same principle as this one was; only the clutch was different from this altogether.

Q. At any rate, you knew, of course, from the fact that you saw him run the engines before, that he was skilled about the matter, and knew about engines, and could run them?

A. He was a good, practical miner, and he was put in a place like that where they need such a man.

(Testimony of Louis Testovarsnik.)

Q. And, of course, if you needed a man at any time to run one of these engines, you would not have any scruples against Andrew, because you knew that he knew how to do it?

A. No; but I think I didn't tell him.

Q. I am not asking you whether you told him or not; but you would not have any hesitancy about getting him, would you, because you knew he knew how to run the engine? A. Yes, sir.

Q. That is right, is it not? A. Yes, sir.

Q. That is all.

Witness excused.

[Testimony of Robert M. Magraw, for Defendant.]

ROBERT M. MAGRAW, called and sworn as a witness in behalf of the defendant herein, testified as follows:

Direct Examination.

(By Mr. DAY.)

Q. What is your name?

A. Robert M. Magraw.

Q. Where do you reside?

A. Aldridge, Montana.

Q. What is your occupation or business?

A. Mine superintendent.

Q. For whom are you working?

A. The Montana Coal & Coke Company.

Q. How long have you occupied that position?

A. For that company?

Q. Yes. A. Three years and five months.

Q. Previous to working for that company, what experience had you had in operating coal mines?

(Testimony of Robert M. Magraw.)

A. I had about eight years' experience in a great number of different mines, both as miner and mine foreman and superintendent.

Q. What were you duties at the plant of the Montana Coal and Coke Company as mine superintendent?

A. I had charge of all the working forces, both inside and outside, as far as they pertained to the operation of the mine, not taking in the clerical force, or the general office.

Q. What officers were there over you?

A. The General Manager.

Q. Who was the general manager?

A. At the time of this accident, Mr. Edmund A. Bartl.

Q. Under you, what officers or foremen or superintendents did you have?

A. The general mine foreman, Mr. Williams, and various shift bosses, who occupy the same position that Mr. Testovarsnik does in the different mines.

Q. What were the duties of the shift bosses like Testovarsnik?

A. To carry out the instructions of their immediate superiors, and to look after the working forces in his territory.

Q. At the time of the accident, what portion of the mine did Mr. Testovarsnik have supervision over?

A. It has been given as the main entry, or straight entry, or old mine. There are three different terms that are used to describe that portion of the workings.

(Testimony of Robert M. Magraw.)

Q. How many mines were they working or operating at that time?

A. They were operating No. 4 and the old mine, which included Mr. Testovarsnik's territory, and the slope, which had another foreman, and we had opened two new mines which were just in a state of development.

Q. You had general supervision of all these operations? A. Yes.

Q. Under you, you had an underground foreman, Mr. Williams? A. Yes, sir.

Q. Who looked after all of them, or a number of them?

A. He looked after a certain number of them. There was one he had nothing to do with. All the others he had a certain charge of.

Q. Mr. Testovarsnik had charge of the territory in the vicinity of this accident? A. Yes, sir.

Q. You have drawn upon the blackboard there some diagrams. Will you explain to the Jury what those are supposed to represent?

A. This is supposed to represent an arrow pointing toward the pit mouth or portal of the mine. The empty cars are brought from the pit mouth to this parting by means of a motor, an electric motor. This is double tracked. The empties come in on one track, and the loads drop out to another parting. The driver for all this inside portion of the mine, which is on a level with the parting, receives his cars at this point, and takes them in and distributes them at the various working places. If he was going beyond this

(Testimony of Robert M. Magraw.)

point, and wanted to leave cars here, he would possibly take in four cars or six, whatever his mule would haul, leaving a certain number, and, as he came out pick up the loads and return them to this parting. This is what has been called the No. 1 slant.

Q. How is that designated on the diagram?

A. By the figure "1."

Q. That is No. 1 slant?

A. Yes, sir. The cars for this point were not handled by drivers, but the rope rider and the engineer, after dropping the cars down by gravity, pushed the empty up over a slight grade, and over the knuckle, and then the engineer would lower it. The second slant is represented by this figure "2," and the "E" represents the location of the engine where the accident occurred. The plaintiff, Mr. Kovec, was working at about this point. This diagram is not drawn on any scale, and I would not know, within a reasonable number of feet, how far it was from the slant, but it was at about this point that he was injured.

Q. How is that designated on the board? By a shaded line? A. By a solid line.

Q. He was working in the air course?

A. In the air course. This would represent a cave that cut off the circulation of the air, and Mr. Kovec and Mr. Strubel were working there, cleaning up that cave and timbering the roof.

Q. Whereabouts was the engine which caused the injury located? A. At this point, "E."

(Testimony of Robert M. Magraw.)

Q. That figure "2" below the E indicates what?

A. The second slant, or slope or dip.

Q. Whereabouts were the coal miners working in that slant?

A. This diagram only shows one room. It was driven on the level. The others would continue down below there; I haven't room to show them on this board.

Q. Explain to the jury how these loaded cars were brought out from those rooms, or from the air-course, and carried up and out of the main entry.

A. The track would be in these places on a comparative level, or possibly a one or two per cent grade, so that the load would drift to the switch on the slant by gravity. At that point, the rope rider would get it, and then, by attaching the rope, it would be hoisted up to the next level place, and then he would drop back and get a second car, or else take the cars up one at a time, whichever he saw fit, until he got it to about that point, where there was an abrupt knuckle. It changed there from a grade in that direction to a level. As the cars came over that, they drifted around the curve, on to the main line.

Q. What power was used in operating this engine, in hoisting the cars up this slant?

A. Electric power.

Q. How was the electricity applied to the machinery of the engine?

A. The electricity was applied by means of metallic plate, a piece of sheet iron or steel attached to the lever; it was known as the positive pole. The neg-

(Testimony of Robert M. Magraw.)

ative was in the bottom of the barrel of water. By bringing the positive pole in contact with the surface of the water, it formed a circuit, and it would act in the same manner as a controller. This plate, being in the shape of a "V," would allow the starting of the machine slowly. As the plate was put down in the water, it would expose a greater surface, and allow a greater flow of current as the plate sets on the bottom plate,—at the maximum.

Q. At the time of the accident, whereabouts was the lever with reference to the machine or engine?

A. The lever was directly in the rear, and to the left of the drum.

Q. How was the hoisting machinery of the engine thrown into play? That is, by what sort of operation? A. By means of a friction clutch.

Q. Where was the clutch located?

A. The clutch was located on the right-hand side of the engine, while the operator was facing the slant.

Q. I will ask you, Mr. Magraw, whether or not you have any picture of the engine in place, as it stood at the time of the accident?

A. Not in that particular place; no, sir.

Q. I will show you a couple of photographs and a catalogue cut, and I will ask you to state what those representations are. The photographs will be marked, respectively, A and B, and the cut in the catalogue will be marked C.

A. The catalogue cut is a representation of a Ledgerwood engine, using the same style of clutch which was on the engine that caused the accident.

(Testimony of Robert M. Magraw.)

The brake is practically the same, with the exception that it is a little farther away from the gearing, but the principle is the same.

Q. What is the motive power of that engine?

A. This is a steam engine.

Q. This engine shown in the cut is a steam engine, instead of an electric engine?

A. It is a steam engine, instead of an electric, the only difference being that instead of using a throttle, which would allow the steam to leave the cylinder, we use a lever which would allow the electricity to enter the motor. The motion used is practically the same, except with the electric engine, it was a downward motion; with the throttle, the motion is the other way.

Q. The operation of the engine, when the power is applied, in both cases would be the same, would it?

A. Yes, sir.

Q. And the use of the clutch would be the same whether the power were electricity or steam?

A. That would have no bearing on the operation, whatever.

Q. State what the photograph marked B represents.

A. Photograph B represents a picture of this same engine after it had been moved from the location where the accident occurred to another mine, belonging to the same company.

Q. It was taken from what direction?

A. The photograph was taken from in front of the engine, showing a front view of the machine.

(Testimony of Robert M. Magraw.)

Q. The camera occupying the position of a man standing near the cars on the track, looking toward the engine?

A. Yes, sir; you can just see the cars, or the track, rather, in the lower right-hand corner of the picture.

Q. Does that picture show the drum with the cable on it? A. Yes, sir.

Q. Does it show the gearing into which the plaintiff is supposed to have fallen?

A. No, sir; that is on the wheel.

Q. Does the cut in the catalogue show the gearing into which the plaintiff fell?

A. No, sir; that is in front of this engine.

Q. Examine the photograph marked A, and state what that is supposed to present.

A. That represents the brake lever, and shows the counter shaft, which was attached to the pinion which operated the drum.

Q. Where was that picture taken?

A. That was taken at the same location, only the camera was pointed downward.

Q. Taken at the same location as B?

A. Yes, sir; only, instead of being taken from in front, it was taken from above, looking downward.

Q. Does that show the gearing?

A. It shows the location of the gearing. In this case, there is a band over it.

Q. The gearing is at this time covered with a band? A. Yes, sir.

Q. If that band were removed, then the condition would be exactly as it was at the time of the accident?

(Testimony of Robert M. Magraw.)

A. Yes, sir.

By Mr. DAY.—If the Court please, we offer to have the witness explain these views to the jury for whatever they be worth, if of any value, as showing the condition of the machine.

The COURT.—You may use them to explain the situation.

Q. Take the cut, Mr. Magraw, and explain to the jury the mechanism of the engine, especially the clutch and the drum, and the place where the electrical power is applied.

A. This cut shows a steam engine, but with the same clutch as on the electric machine. The clutch and the brake are practically the only points of similarity. The throttle, and the cylinder, and the other steam appliances on this machine, are not in evidence on the electrical machine.

Q. Point out to the jury, on that cut, with reference to that machine, about where the operator would stand in operating the electrical machine, if you can.

A. Say that this represented the lever, by which the current was applied; the operator would grasp this lever with his left hand, and the clutch with his right hand. He would, of course, be standing directly behind the drum. The brake would naturally be operated by the left foot. Nine men out of ten would operate the brake with the left foot. This is the brake here in this machine. The brake extends further out from the gearing. In the machine in question, the brake was, I suppose, fourteen or sixteen or eighteen inches from this gearing.

(Testimony of Robert M. Magraw.)

Q. Explain to the jury the operation of the clutch, and the offices that the clutch performed.

A. Mr. Drummond verly ably explained it this morning. The clutch drives a pin in against a key which is in a slot in the shaft. There is a hole in the center of the shaft with a thread, a compound thread, and that drives a pin against the key, and the key presses against the collar of the drum or hub, and drives the drum away from the clutch and against the gearing, the drum gearing, and simply by friction keeps it from slipping, and draws the load. If there is any slipping, as soon as it heats, it takes up.

Q. In other words, then, when the clutch is thrown in, the drum, with its accompanying gearing, is thrown into the gear operated by the electric current, is it? A. Yes, sir.

Q. And in that way, the drum is caused to revolve?

A. It causes the drum to revolve with the gearing. When the clutch is thrown out, the drum is disconnected from the gearing, and the gearing may revolve indefinitely without affecting the drum.

Q. What is the purpose of the brake?

A. The brake is used to lower a trip, or a car, or a cage, or to hold it in a given position,—either a load or an empty.

Q. The brake is to check the motion of the drum when in gear, is it, or to hold it at a particular place?

A. Either in gear or out of gear. Of course, if a man sets his brake, with the power on at the same time, he is either going to cause an accident,—that is,

with an electric machine, he is either going to break the brake or blow out a fuse, because of an overload on the machine.

Q. After the jury has examined the photograph marked B, you may explain it to them.

(Witness explains photograph marked B to the jury.)

Q. In the operation of the engine in question, located as it was at the time of the accident, what was it necessary for the operator to do to start the engine to pull up a load?

A. It was first necessary to throw in the clutch; then to use the lever, which acted in the place of a controller.

Q. How many motions were required to do that?

A. Two.

Q. Was it necessary for the operator to move from his standing position after performing the one to do the other? A. No, sir.

Q. Now, in stopping the engine, what was necessary to be done?

A. To throw out the clutch, and let go of the lever; it released itself; it has a counter-balance, and when in use, the position is like that (indicating), with the weight on the rear end; the minute the operator raises his hand from it, it would move automatically and cut off the current.

Q. What necessity, if any, was there for putting the foot on the brake?

A. Ordinarily, or at any specific time?

(Testimony of Robert M. Magraw.)

Q. At any time; when he was stopping the loads at the end of a run?

A. I think there was no necessity, because the act of throwing out the clutch released the drum from the gear, and the drum was loose on the shaft.

Q. What effect would be produced by stepping on the brake, after having released the power?

A. Well, the man might stand on the brake for a week without stopping the movement of the gear, if the clutch was out, because the brake was attached to the rim of the drum, and the act of throwing out the clutch released the drum from the gear. The gear might run indefinitely without any effect whatever upon the drum.

Q. What effect would stepping upon the brake have upon the movement of the drum?

A. It would simply hold the drum stationary.

Q. How long had this engine been in operation in this place at the time of the accident?

A. Several months; I don't remember exactly how long.

Q. How far was it from the main traveled path that the miners took to go into slant No. 2?

A. Possibly four or five feet.

Q. Was it in plain view?

A. Yes, sir.

Q. How was it lighted?

A. By electric lights.

Q. How many lights were there there?

A. Two.

Q. Whereabouts were they placed?

(Testimony of Robert M. Magraw.)

A. One was direcly over the engine, and one was out over the track, over the knuckle, so that the operator could see the loaded car or the empty car as they traveled in either direction.

Q. In this photograph, maked B, there appears to be an electric light. Was the light at the scene of the accident located similarly to that?

A. Practically the same; yes, sir. It might have been a few inches to one side or the other; I don't remember that.

Q. Was this engine ever used at any other place in the mine than at this particular place, prior to the accident? A. Yes, sir.

Q. Where had it been used?

A. It had been used in No. 4 mine.

Q. Where is No. 4 mine with reference to this place? A. About half a mile south.

Q. Something has been said about an engine used in No. 1 slant. What sort of an engine was used there?

A. Practically the same kind of an engine as this, with the exception that the drum was a little larger, and the clutch was slightly different. It was what is known as a gear clutch, instead of a friction clutch.

Q. What was the difference, if any, in the operation of the clutch in the instance of the gear clutch and the instance of the friction clutch?

A. The friction clutch on this particular engine had to be held; there was no way of locking it in place. It could have been rigged that way, but it never was. It was more convenient for the operator

(Testimony of Robert M. Magraw.)

to hold it. On the other engine, when once the clutch was thrown in, it would stay until released by the operator.

Q. Was there any difference in the operation of the brake upon the two engines? A. No, sir.

Q. Were the brakes similarly located on the two engines?

A. I think they were practically the same.

Q. When this engine was used in No. 4 mine, was it equipped in the same way that it was at the time of the accident? A. Identically; yes, sir.

Q. How long was it operated in No. 4 mine?

A. It was operated there for possibly eight or ten months.

Q. Do you know what the custom was in operating this engine in the No. 4 mine, as to whether or not a driver or engineer was always used in connection with it?

A. The driver was used in the night-time,—

By Mr. NOLAN.—(Interrupting.) We object to this as wholly immaterial.

The COURT.—Let him answer.

A. (Continuing.) And in the day-time an engineer was employed. On one shift the miners used it.

Q. What did you say about the night-time, just before Mr. Nolan interposed his objection?

A. Well, we worked three shifts; one from seven to three. An engineer was employed on that shift. On the next shift, from three until twelve, the driver or the night foreman operated the engine. From

(Testimony of Robert M. Magraw.)

twelve until seven in the morning, the miners employed in the various places off the dip of the main entry where this engine was located, used it themselves.

Q. What was the reason for employing an engineer on one shift, a driver on another, and on the third shift, letting the miners use the engine themselves?

A. The reason for employing an engineer in the day-time was that we worked more men in the day-time; we had work for the engineer to do. On the three o'clock shift, we worked a fewer number of men, and then, the driver being there possibly one or two hours during the shift, and the foreman being there possibly an hour or so, they could do the work. On the other shift there was never more than two or four men, and it didn't pay to keep a man there to hoist what few cars they would load.

Q. About how long was this engine operated in the No. 4 mine, if you know?

A. I believe I have already stated eight or ten months, as near as I remember.

Q. Do you know whether or not Mr. Kovec worked in that No. 4 mine during that period of time? A. Yes, sir; I do.

Q. What was your custom as to the shifts upon which these miners worked?

A. The miners changed shifts every three weeks. That is, a man who was on the day shift this week, at the end of three weeks would be on the eleven o'clock shift, and the man who was on the eleven

(Testimony of Robert M. Magraw.)

o'clock shift would be on the day shift. Every three weeks, a man would be on the 11 o'clock shift, if he started in on the day shift.

Q. So that they would work a week on each shift?

A. Yes, sir; they would change about to keep one man from working night shift constantly.

Q. Now, at the time of the accident, how many men, if you know, were employed in this slant No. 2?

A. That is, at the time of the accident?

Q. Yes; on the shift on which the accident occurred, how many men were employed in there?

A. Probably eight or ten men.

Q. Is that a large number of men for a shift, or a small number?

A. Well, that is a small number of men; that was just simply one local place in the mine.

Q. How many drivers were employed in that entry at that time on a shift?

A. On the day of the accident, or prior to it?

Q. Yes; on the day of the accident.

A. One.

Q. Usually, at that time, how many were there?

A. It simply depended upon the number of men who were working on any given day. Some days, we would work two drivers, and some days only one, and some days we would have another mule sent in from the barn, and the foreman or Williams, or someone, would help out the driver. There was not enough work for two, and too much work for one.

Q. What was the custom with reference to the use of this engine by the rope rider?

(Testimony of Robert M. Magraw.)

A. The operation of the engine was very simple, and the rope rider could run it equally as well as the engineer.

Q. State whether or not the engine, as it stood there at the time of the accident, could be operated by any person of ordinary intelligence.

By Mr. NOLAN.—We object to that on the ground that the witness has not yet shown his competency to testify on that subject.

The COURT.—Mr. Magraw, do you know how to operate that machine?

A. I have operated it; yes, sir. I have operated almost all classes of machinery that were used in and about coal mines, with the exception of heavy hoisting engines.

The COURT.—He can answer the question.

(Question read by the stenographer.)

A. Do you mean whether it was permissible?

Q. No; whether the person could operate it.

A. Any person of ordinary intelligence who had ever seen it operated once could operate it.

Q. Now, what have you to say as to whether or not, according to your knowledge, anybody other than the driver at that time was supposed to operate the machine as it stood there?

A. No, one, unless it would have been myself, or some of the foremen under me.

Q. State whether or not any orders were given by you at that time for anybody else to operate it.

A. No, sir.

(Testimony of Robert M. Magraw.)

By Mr. NOLAN.—We object to that question as immaterial, and move to strike out the answer.

(Argument by counsel for the respective parties.)

Objection overruled, motion denied; plaintiff's exception noted.

Q. State whether or not you had any knowledge that there was any shortage of drivers on the day of the accident? A. I had not.

Q. How long had these engines been used in the coal mines, without any covering over the gearing?

A. Since the first installation.

Q. How many years was that?

A. It would be fifteen months or eighteen months.

Q. Were these engines used in No. 4 mine without any covering over the gearing?

A. Yes, sir.

Q. Were they used in No. 4 with the brake in the same position with reference to the gearing as in this place? A. Yes, sir.

Q. State whether or not, at any time prior to this, you had ever had an accident similar to the one in question? A. We had never had any accident.

Q. Had you ever seen these engines used elsewhere?

A. I had never seen them exactly the same, but I had seen engines of similar construction.

Q. Had you ever seen a Ledgerwood engine, similar to the one shown in the catalogue, without guards on the sides?

A. Yes, sir, cuts of that kind are shown in the catalogue.

(Testimony of Robert M. Magraw.)

Q. State whether or not the revolving of the cog-wheel in the gearing in this machine would be apparent to a person who was standing in the position that Kovec testified he was standing when he undertook to operate the machine? A. Yes, sir.

(Whereupon, further hearing herein was continued until Friday, January 8, 1909, at ten o'clock A. M.)

Friday, January 8, 1909, Ten o'clock A. M.

Direct Examination of ROBERT M. MAGRAW (Resumed).

(By Mr. DAY.)

Q. Mr. Magraw, you heard the statement of the witnesses yesterday, relative to a tool-box, where Louis Testovarsnik was supposed to be seated in the morning, when the men went into the mine, did you?

A. Yes, sir.

Q. Is the location of that tool-box indicated upon that diagram you have drawn? A. Yes, sir.

Q. Designate that, and point it out to the Jury, using some figure or letter that will indicate its location.

A. The tool-box is located on the outside of the engine, in the first slant.

Q. How far is that tool-box from the engine which occasioned the injury in controversy?

A. I would judge between four and five hundred feet.

Q. How far, if you know, is the entry to this air-course, in which the plaintiff was working on the day of the accident, from the engine in controversy?

(Testimony of Robert M. Magraw.)

A. The entrance to the air-course, or the place where he was working?

Q. The entrance to the air-course from the slant.

A. I would judge between thirty-five and forty feet.

Q. That is all.

Cross-examination.

(By Mr. NOLAN.)

Q. You say that you have filled almost every position in a coal mine, Mr. Magraw? A. Yes, sir.

Q. You commenced at the bottom, and you have been working up, so that you are almost to the top or close to the top now?

A. I don't think I am close to the top.

Q. Well, you are the general superintendent?

A. Yes, sir.

Q. And there is only one other man above you?

A. Yes, sir.

Q. So, you couldn't get any closer to the top until you got there yourself? That is true, is it not?

A. Yes, sir.

Q. Now, how long were you running engines?

A. At different times, I have run them possibly a month or so, engines of this class. I stated that I had used nearly every kind that is used in a coal mine.

Q. When did you last run an engine of this class? Of course we have reference to an engine of the class used in No. 2 slant.

A. Well, I have used that engine.

Q. When? A. In quite a few instances.

(Testimony of Robert M. Magraw.)

Q. Yes; but I am asking you when?

A. I don't remember the day and date.

Q. You don't remember?

A. I didn't mark that down; no, sir.

Q. And you ran it because of the absence of the man whose duty it was to run it, or was it simply run by you in the performance of your duties?

A. It was run by me in the absence of the man whose duty it was to run the engine.

Q. Do you remember whether you have run it since it was installed at No. 2 slant?

A. No; I do not.

Q. That is, do you mean that you don't remember whether you ran it since that time, or do you mean that you didn't run it?

A. I endeavored to state that I did not run it there in that position.

Q. Where was it at the time that you ran it?

A. I ran it when it was located in the No. 4 mine.

Q. This machine, if I understand you, was perfect, and without any defects at all?

A. I think I so stated.

Q. Yes; you so stated. At the time that you ran it, did you notice whether there was any trembling or lateral movement of the brake?

A. No; I didn't notice any lateral vibratory motion.

Q. If there should be such a lateral vibratory motion, which you say you didn't notice, would you say it was all right?

A. I said I never noticed.

(Testimony of Robert M. Magraw.)

Q. I asked you if you would say it was all right. I am not asking you whether you noticed it or not. You said you didn't notice it. But would you say that the machine was all right if there was that lateral motion?

A. No; if there was lateral motion to it, I would not say that it was all right.

Q. Why would you say that it was all right with a tremulous motion,—not lateral?

A. Because, in the brake of that kind, it is impossible to have it without some tremulous motion. There was never a brake of that kind constructed without some tremulous motion.

Q. There would be a tremulous motion, of course, when the brake, through its attachment, came into contact with the drum, I realize that. But would it have a tremulous motion when it would not be so attached?

A. That brake is always in contact with the drum.

By Mr. DAY.—We object to this as not proper cross-examination.

(Argument by counsel for the respective parties.)

The COURT.—Go ahead. This is proper cross-examination.

By Mr. DAY.—Note an exception.

Q. You say that the brake in its present situation is always connected with the drum?

A. I said the brake band is always in contact with the outside circumference of the drum. It is not like a brake that operates with a lever that is

(Testimony of Robert M. Magraw.)

rigid, and that is released by a ratchet, and set, which holds the band away from the circumference of the drum. The oscillation of the drum on the shaft, coming in contact with the brake band would cause this extended lever to vibrate slightly, something in that manner (illustrating).

The COURT.—I would like to have the witness tell us whether or not there always is, in the operation of these machines, more or less oscillation.

A. In a brake of this character there always is. That is, in my experience. I have never seen one in which there was not. There is always more or less slight vibration.

The COURT.—Do you draw any distinction between vibration and oscillation? What I mean is a lateral motion.

A. I understand. There is very little lateral motion or oscillation. The vibration would be up and down.

Q. Will you take this tablet of paper, and show us the vibration that you are conscious of?

A. It would be about like that (illustrating).

Q. Not to exceed that?

A. Not to the best of my knowledge; no, sir.

Q. And this would be the character of the vibration? A. Not quite that much.

Q. It would not be that much?

A. I said I had never seen the lateral motion.

Q. You never saw that. You were in the courtroom when Mr. Drummond testified in this case were you not? A. Yes, sir; I was.

(Testimony of Robert M. Magraw.)

Q. He was the gentleman who *kept moved* that machine around from place to place, was he not?

A. Mr. Drummond moved the machine once or twice to my knowledge; I don't remember how many more times.

Q. Do you recollect who it was that installed the machine?

A. It was a man by the name of Frank Alley, if I remember right.

Q. Are you certain about that? Mr. Drummond said he was the one.

A. I think Mr. Drummond was mistaken, but I could not swear that he did not.

Q. You speak about his moving it a couple of times. A. Yes, sir.

Q. Can you tell us where it was moved to? Where was it moved to from No. 4?

A. Mr. Drummond set the machine up first in No. 4, and then moved it from one location in No. 4 to another, and then, I think, dismantled it in No. 4, and brought it to the old mine, and from the surface I thought it was taken over and set in place by a man by the name of Frank Alley.

Q. Where is Alley?

A. He is in Aldridge.

Q. He is not here as a witness, is he?

A. No, sir.

Q. You knew, of course, that that machine and its operation had to do with this controversy?

A. I believe I did.

(Testimony of Robert M. Magraw.)

Q. And notwithstanding your knowledge of that fact, you didn't bring Alley here to testify, did you?

By Mr. DAY.—We object to this as not proper cross-examination of this witness. Counsel's examination of the witness is abusive.

The COURT.—Avoid argument with the witness.

Q. At any rate, Alley is not here, and he is in Aldridge, in your employ still, is he not?

A. Yes, sir.

Q. You say that your best recollection is that he was the man who installed that hoisting engine at the No. 2 slant? A. Yes, sir.

Q. During the time that the men were working in the No. 4 mine, where on the particular shift that you refer to the miners themselves operated the machine, are you prepared to swear that the plaintiff operated the machine then? A. I am not; no.

Q. You are not prepared to swear, are you, that every man who worked on that shift operated the machine? A. I couldn't swear to that.

Q. Do you know whether at the time that the plaintiff was working on that shift, every third week he worked alone, or whether he had some person working with him?

A. He had a person working with him.

Q. Do you know who it was? A. Yes, sir.

Q. Who was it?

A. A man by the name of Frank Strutsel.

Q. In the No. 4 mine? A. Yes, sir.

Q. That is the Strubel who has testified here?

A. No, sir; this man's name is Strutsel.

(Testimony of Robert M. Magraw.)

Q. The name is similar in character, but still different. Do you know where he is now?

A. Yes, sir.

Q. Where is he? A. He is in Austria.

Q. Have you any personal knowledge of the fact as to whether he used to operate the machine or not?

A. No; I have not.

Q. About how long a time was the plaintiff working in the No. 4 mine?

A. I think he had worked there for possibly eighteen months or two years before the time I came there, or after the time I came there, I should say; I don't know how long before.

Q. And during all of this time, it was the custom, as I understand it, that a particular shift out of the twenty-four hours,—that in a particular shift out of the twenty-four hours, the miners themselves operated the machine? That is the shift worked from after midnight until seven in the morning.

A. Not during all the time; no. The machines were not installed immediately upon my taking charge of the plant; and for various periods they were not in operation.

Q. Well, now, within the domain of your knowledge, how long a time under this custom would the plaintiff have to operate that machine? You say that it was not installed for some time after you came there, and that for a considerable time, it was not in operation at all. Now, give us the period of time when, under this custom, he would have the opportunity of operating the machine?

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Q. During the time that the men were working in the No. 4 mine, where on the particular shift that you refer to the miners themselves operated the machine, are you prepared to swear that the plaintiff operated the machine then? A. I am not; no.

Q. You are not prepared to swear, are you, that every man who worked on that shift operated the machine? A. I couldn't swear to that.

Q. Do you know whether at the time that the plaintiff was working on that shift, every third week he worked alone, or whether he had some person working with him?

A. He had a person working with him.

Q. Do you know who it was? A. Yes, sir.

Q. Who was it?

A. A man by the name of Frank Strutsel.

Q. In the No. 4 mine? A. Yes, sir.

Q. That is the Strubel who has testified here?

A. No, sir; this man's name is Strutsel.

(Testimony of Robert M. Magraw.)

Q. The name is similar in character, but still different. Do you know where he is now?

A. Yes, sir.

Q. Where is he? A. He is in Austria.

Q. Have you any personal knowledge of the fact as to whether he used to operate the machine or not?

A. No; I have not.

Q. About how long a time was the plaintiff working in the No. 4 mine?

A. I think he had worked there for possibly eighteen months or two years before the time I came there, or after the time I came there, I should say; I don't know how long before.

Q. And during all of this time, it was the custom, as I understand it, that a particular shift out of the twenty-four hours,—that in a particular shift out of the twenty-four hours, the miners themselves operated the machine? That is the shift worked from after midnight until seven in the morning.

A. Not during all the time; no. The machines were not installed immediately upon my taking charge of the plant; and for various periods they were not in operation.

Q. Well, now, within the domain of your knowledge, how long a time under this custom would the plaintiff have to operate that machine? You say that it was not installed for some time after you came there, and that for a considerable time, it was not in operation at all. Now, give us the period of time when, under this custom, he would have the opportunity of operating the machine?

(Testimony of Robert M. Magraw.)

Q. And notwithstanding your knowledge of that fact, you didn't bring Alley here to testify, did you?

By Mr. DAY.—We object to this as not proper cross-examination of this witness. Counsel's examination of the witness is abusive.

The COURT.—Avoid argument with the witness.

Q. At any rate, Alley is not here, and he is in Aldridge, in your employ still, is he not?

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(Testimony of Robert M. Magraw.)

but that has nothing to do with the proper running of the engine.

Q. Now, in this particular instance, suppose that something should happen. Sometimes something is likely to happen in the operation of any engine, is it not? A. Yes, sir.

Q. And, of course, the man who never saw the engine, except to see a man run it once, would be just as capable to meet an emergency of that kind as an experienced man in the case of this engine, would he?

A. State an instance of what might happen?

Q. Take, for instance, the inability to get the gearing loose from the drum through that clutch.

A. I never experienced that.

Q. Well, supposing it should occur.

A. I know nothing about it.

Q. And supposing at the same time, the rope is coming up on him, with an iron on the end of it, and it is likely to strike; the man who saw the thing done once is just as likely to handle things properly as an experienced man?

A. There was plenty of room to escape anything that might be coming around the drum.

Q. You don't answer my question. Is the man inexperienced just as capable, in your judgment, under those conditions, as the experienced man?

A. I stated that I knew nothing about—

Q. (Interrupting.) I know you so stated, but I am assuming that condition of things.

A. I am not able to answer.

(Testimony of Robert M. Magraw.)

Q. You are not able to answer, and you won't. Now, were you here when, as a matter of fact, your driver, who was operating that engine, testified that whenever the drum was in motion, he couldn't detach the gearing? That is, by the use of the clutch.

A. He also testified that other people could do it, but he was unable to do it.

Q. He was unable to do it? A. Yes, sir.

Q. Yet he was a man of experience, and he tried to do it, and was unable to accomplish it. How do you account for the fact that some could do it, and some could not.

A. I don't account for it at all, because I don't understand it.

Q. Do you know of any reason, in the light of your knowledge of that machine, why there should be any difficulty when the drum is in motion in detaching that gearing?

A. None, whatever; no, sir.

Q. And why, when the drum is stopped, there should be any difficulty in detaching it. You can't understand how that condition should exist, can you?

A. Yes, I understand how it could exist.

Q. Will you tell us how? Is it simply through the inability of the man who was trying to make the detachment?

A. No, sir; not through the inability of the man who was trying to make the detachment. There is only one possible way in which there could be any difficulty in throwing out the clutch. That clutch is actuated by a compound screw, and while the machine

(Testimony of Robert M. Magraw.)

is in motion—I am simply stating this as a probability; I don't know that it is so, and I don't want to be taken as stating this under oath.

Q. We will not put any responsibility upon you.

A. It might be that the motion of the engine being in the same direction as the threads on this screw, it would bind the screw in the shaft. That is the only reason I can give. When the engine is at resent, of course, there could be no strain against the screw.

Q. Well, of course, you realize, don't you, as an experienced man, and as an expert in those matters, that if an inexperienced man encountered a difficulty of that kind, he would be likely to get excited, would he not?

A. I don't know whether he would or not.

Q. Now, we will go back for a moment to the rope. You said there was lots of room for him to get out of the way. What do you mean by that? He is standing right there, and the rope is going by him as it is being revolved around the drum, is it not?

A. A man would be foolish to step behind it, and be struck with the rope, when by stepping to one side two feet, he would be out of the way. It wouldn't deflect to the side of the drum.

Q. The rope is going loose, is it not? There is nothing on the end of it now? It is simply being revolved around the drum, with the loose end flying? Isn't that true? Now, you think that the rope should go gently around, do you, under those conditions, and there should not be any danger from its revolving around the drum?

(Testimony of Robert M. Magraw.)

A. I didn't make that statement at all.

Q. You said it could not possibly deflect more than two feet from its position.

A. I didn't say that, either. I said that it could not deflect from either side of the drum.

Q. Oh, from either side of the drum?

A. Yes, sir. That rope, in coming in there, would wind on the drum until it came close to the end, and that end would simply revolve with the drum. The centrifugal force would throw it possibly two or three feet back and in front of the drum, as it came around on each revolution.

Q. How much of a leeway to get around did the man have who was in there with those levers within his reach?

A. He had three or four feet on the side that was used by the engineer in going to and from the engine. On the other side, he had possibly three or four feet there. It was taken up with the barrel that was used in connection with the controller.

Q. Well, if it was taken up with a barrel, it would not be available for use by him, would it, unless he got into the barrel?

A. He might have gone behind the barrel.

Q. That is, he could have dodged behind the barrel? Did you testify that on the 23d of September, there was not a driver short?

A. I don't think that I did; no.

Q. You testified that you were advised that there was?

(Testimony of Robert M. Magraw.)

A. Yes, sir. I also testified, I think, that if there had been a driver short, I would have been advised; that that was the general custom.

Q. Now, who was the driver on the No. 2 slant that day? Who was the regular driver there?

A. William England.

Q. Was he there regularly?

A. He had been there regularly for several days; I don't remember how long.

Q. You say several days. He was there the day before the accident occurred? Who was there before him? A. We had had several.

Q. Well, who was the one that was there directly before William England? A. John Forsythe.

Q. How long did England continue there after the 23d of September?

A. He continued there up until the time we stopped that part of the work.

Q. That is, in No. 2 slant?

A. He was driving in that particular part of the mine; not only occupied in hauling coal from the No. 2 slant alone, but any place where there was coal for him to haul.

Q. Was he assisted by anyone else?

A. He might have been on odd days, when there was more work than he could handle.

Q. Was he assisted by anyone else just before the 23d of September?

A. He probably was; yes.

Q. By whom, if by anybody?

A. I think Mr. Testovarsnik testified that he assisted him, and I think Mr. Williams assisted him.

(Testimony of Robert M. Magraw.)

Q. I think you are mistaken about that. Mr. Testovarsnik is not a driver. He is the foreman. Who was the driver who assisted him?

A. You didn't ask me who the driver was. You asked me who assisted him.

Q. Well, who was the driver that assisted him. I was asking you about who the driver was, who assisted him afterwards, and you told me. Now, I want to know by whom he was assisted before the 23d of September?

A. I don't know who any particular driver was. Probably there was a dozen. I couldn't tell you any particular one. I could name over all the drivers that worked there; but there was probably one driver to-day, and another driver to-morrow.

Q. Do you know where Jack Forsythe was on the 23d of September, 1907?

A. Well, from my knowledge of him, I would presume that he was drunk.

Q. And if he was drunk, he was not there driving, was he?

A. I didn't claim that he was; no, sir.

Q. And if he was not drunk, and if he was there that day, he would be driving, would he not?

A. I don't know that.

Q. That was his business, was it not? He was driving afterwards? You have told us that.

A. He did quite a number of jobs. He ran the motor occasionally, and drove, and dug coal.

Q. Did you know of his driving at any time before the 23d of September, 1907?

(Testimony of Robert M. Magraw.)

A. Yes, sir; I did. He drove in quite a number of places.

Q. That was his regular business, was it not?

A. I presume you might say it was; yes. He did more of that than anything else.

Q. And it is more than likely, is it not, under the circumstances that existed there, that if he were there on the 23d of September, instead of being drunk, he would be driving?

A. He might have been, and he might have been running the motor. I have already stated that.

Q. Of course, running the motor would be a portion of the business of the driver, would it not?

A. No, sir.

Q. The driver did not run the motor?

A. No, sir; he did not.

Q. He did not? A. No, sir.

Q. Well, who did? A. The motorman.

Q. And who was the motorman at the No. 2 slant on the 23d of September?

A. There was no motorman there; there was an engineer.

Q. Well, then, who was the engineer there on the 23d of September? A. William England.

Q. He was the driver, was he not?

A. Yes, sir. You were talking about a motorman; not an engineer. There is a difference between a motor and an engine.

Q. Where were you on the morning of the 23d of September about ten or fifteen minutes to seven?

(Testimony of Robert M. Magraw.)

A. I imagine I was in the weigh office on the outside of the mine.

Q. You imagine that you were?

A. Yes, sir.

Q. Am I to infer from that that you were there, or that there is some doubt about it?

A. There may be doubt about it, because I don't remember exactly.

Q. You didn't see the men going into the mine that morning at all, did you?

A. I presume that I did; but I couldn't take oath that I did.

Q. Of course, when we are in the mine here, where my pencil indicates on the diagram, where you say this tool box was, we are a considerable distance underneath the surface, and in under the ground, are we not? A. Yes, sir.

Q. This line along here, of course, in the mine, actually is a horizontal line, is it not?

A. Yes; but it is not a straight line.

Q. The slant here, of course, is not horizontal? It is going down into the earth?

A. It is going across the pitch. We call them slants to distinguish them from slopes. A slope is supposed to go straight with a pitch.

Q. This slant then does not follow exactly as indicated here?

A. Not directly; it follows the pitch to make a lesser grade.

Q. The slope, as I understand it, follows the bed of the coal, that is, the coal bed, does it?

(Testimony of Robert M. Magraw.)

A. Slant, you say? The slant?

Q. The slope.

A. The slant follows the vein.

Q. And it has the same dip, has it not, as the vein has?

A. No; I say it crosses the pitch at an angle. Instead of going straight with the pitch, it crosses the pitch at this angle (indicating), or at any angle from a right angle to a strike which would give an easier grade.

Q. So that its slope or declination may be different from the slope or declination of the coal bed itself? A. Yes.

Q. And, of course, might be affected by the extent of the width of the coal body?

A. I don't understand that.

Q. That is to say, the difference in the slope may extend to the full width or depth of the coal body or the vein? A. That is Greek to me.

Q. Well, if the slant followed the vein—

A. (Interrupting.) That is following the vein.

Q. Yes; but sometimes you go across?

A. The vein is there just the same.

Q. But without the regularity in the descent of the vein?

A. You are still in the vein. Coal mining is entirely different from quartz mining.

Q. I understand that. I will get you to explain it, then, if I can't make myself understood. Will you explain why it is that there should be a difference

(Testimony of Robert M. Magraw.)

in the slope of the slant from the slope of the vein itself?

A. I have already endeavored to explain that to you. If the dip was crossing the pitch, the pitch would be at a right angle to the strike or level line of the vein. If it came down there at a right angle, it would be following the pitch exactly. When you bring it across from a right angle, you cross the pitch, and naturally get a lesser grade.

Q. What was the depth of the coal body there, or its thickness?

A. It varied all the way from four to six or eight feet.

Q. From four to six or eight feet. You say the distance from the No. 1 slant to the No. 2 slant is about four or five hundred feet?

A. I said about four or five hundred feet.

Q. Do you know whether they were using the No. 1 slant at all? A. Yes, sir.

Q. On the 23d of September, that is?

A. Yes, sir.

Q. Do you know who it was that was attending to the engine there,—a regular engineer?

A. Yes, sir.

Q. Do you know where the No. 3 slant was, with reference to the No. 2? How far distant was it?

A. About four hundred feet, I guess.

Q. Do you know whether they were using a hoisting engine in No. 3 slant on that day or not?

A. I think not.

Q. You say you think not? A. Yes, sir.

(Testimony of Robert M. Magraw.)

Q. And you think so, because that is the case, I suppose; or are you certain about that?

A. I couldn't take oath to that, although I am morally certain that there was not.

Q. Now, you don't know, of course, where the plaintiff was working in this air course? That is, the distance from the slant? A. Yes, sir, I do.

Q. Well, if you do, tell us?

A. I have marked it there on the diagram.

Q. I am asking you the distance?

A. The diagram is not drawn to any scale, but it is a distance of about forty or fifty feet.

Q. That is to say, there would be forty or fifty feet of distance to the slant, and forty or fifty feet after you got to the slant, to the engine?

A. I said that was about thirty-five or forty feet.

Q. So that really the plaintiff was about eighty or eighty-five feet away from the engine on the 23d of September when he was working there in the air course? A. Yes, sir.

Q. There wasn't any man working nearer the engine in the mine on that day than the plaintiff?

A. Not that I know of.

Q. Can you tell us where the men were working who were next nearest to the engine and to the plaintiff?

A. They were working in what is known as No. 1 room.

Q. No. 1 room, you say? A. Yes, sir.

Q. How far would that be from where the plaintiff was working?

(Testimony of Robert M. Magraw.)

A. About sixty feet at that time.

Q. In going from one place to the other, you would go right across here (indicating on diagram), and go the slant, and then into the room where they were?

A. I presume the nearest way would be around through the slant.

Q. And this distance (indicating), you say, would be about eighty feet?

A. It would be about eighty feet to the switch.

Q. That is, to the switch that was in the air course? A. In the air course.

Q. And the switch would start, would it not, at the slant?

A. It would be seventy-five or eighty feet from where the men were working to the commencement of the switch in the air course, where the plaintiff and his associate were working.

Q. Now, I understand you to say that when these cars, which were brought up No. 2 slant on the track, came to the main entry, they swung around on a curve in the direction of the opening?

A. Yes, sir.

Q. Well, did this slant commence immediately at the main entry?

A. It did, of necessity. It connected with it.

Q. I don't understand that just exactly. Of course, it may be due to dullness on my part. The rope was tied to the front of the car, was it not?

A. Yes. I will explain it to you. Do you see the pitch down here (indicating)?

(Testimony of Robert M. Magraw.)

Q. Yes.

A. That pitch would be about here (indicating).

Q. So that the cars would get on the level in this slant before they struck the main entry?

A. Yes, sir.

Q. Of course, if that were not the case, it would not be possible for the rope attached to the front car, as it swung around here, to be effective in pulling those up, would it, with the drum up here? You would have the rope interrupting the progress of the car, would you not, unless you have the level place in the slant?

A. You have to have a level place for them to land; yes; or else transfer your coal from one car to another.

Q. Now, do you know whether there was a disconnecting of the rope from the cars before the cars came to a standstill?

A. Sometimes there would be; yes; and sometimes not. When the ropeman was doing his own hoisting, he would have blocks on the track to stop the load.

Q. Under the system that prevailed there, there was not any signal by the rope rider to the man operating the engine as to when to shut off the power? Was there a signal given by the rope rider to the man operating the engine, when to stop the power?

A. That is a question I can't answer, because I don't know.

(Testimony of Robert M. Magraw.)

Q. If there was not a signal of that kind to be given by the rope rider, it would be constantly necessary, would it not, for the man operating the engine, to watch the movement of the cars?

A. As long as they were in his sight; yes, sir; that is part of his duty.

Q. And, of course, it would be his duty to shut off the power the very moment that these cars got to this level portion of the slant,—that is, right near the top?

A. That would be a part of the operation of the machine.

Q. That is all.

Redirect Examination.

(By Mr. DAY.)

Q. Did you ever hear of England's having had any trouble in throwing this clutch, prior to his testimony yesterday?

A. No, sir; I never heard of anyone having any trouble.

Q. How long did England operate this hoist there?

A. I couldn't answer that; he had operated it for some time.

Q. Well, about how long? Was it days or weeks? A. Weeks, I think.

Q. During your cross-examination, you distinguished between the motorman and the engineer. What did you mean in speaking of the motorman?

A. The motorman is the man who operates the traction locomotive, the electric mine locomotive.

(Testimony of Robert M. Magraw.)

Q. Where does it run?

A. It runs from this side track or parting to the surface, a distance of about 4,800 or 5,000 feet.

Q. He has nothing, whatever, to do with the operation of the engines at the slants, has he?

A. Nothing, whatever.

Q. In the operation of this hoisting engine ordinarily how fast did it run?

A. Not faster than 150 feet per minute. That is, the rope would travel about that speed.

Q. Would the speed be affected by the number of cars?

A. To a greater or less extent; yes, sir.

Q. How fast would you say that a car would come up that slope, pulled by that engine?

A. I presume that with a full load, two cars, it would run at not to exceed one hundred and fifty feet.

Q. Now, did this rope rider have anything to do with turning the cars when they arrived at the top of the slant and got on to the main road way?

A. Part of the rope rider's duty was to cut the rope from the front of the first car as the cars rounded the curve; he spragged the wheels so as to bring them to a stop within a few feet of the switch. He possibly would stop them back on the knuckle.

Q. Did the miners, including the plaintiff, wear any lights on their caps on this occasion?

A. I could not swear to this occasion, because I was not there.

(Testimony of Robert M. Magraw.)

Q. But working in the mine, what was the custom of the miners in that respect?

A. I never saw a miner who did not, because it is the only way he has of seeing.

Q. So that it was the custom of all the persons in the mine to carry lights on their caps?

A. In their hands or on their caps.

Q. They are provided with lights for that purpose, are they?

A. They provide their own lights.

Q. That is all.

Recross-examination.

(By Mr. NOLAN.)

Q. You say that those lights are not invariably carried on the caps of the miners?

A. The miner will either carry it on his cap or in his hand. When his hands are occupied, he would naturally have it in his cap. When his hands are occupied with something else, he would naturally have it on his cap.

Q. If a man were working in this air course, and he would simply be there during the day's work, he would not be likely to have the light on his cap, would he?

A. I don't see how he could help it. He couldn't see without a light.

Q. He might have the light placed beside him, where he was working, might he not?

A. He might; certainly.

Q. If as a matter of fact, he had the light placed beside where he was working, and he had occasion

(Testimony of Robert M. Magraw.)

to go up here to the place where the electric hoisting engine was, there were electric lights along in there, and he could see his way without carrying his light?

A. The electric lights would not throw any light in here (indicating on diagram). There was a door at the knuckle that would shut off the light. A man going from there would take the light with him.

Q. That is all.

Witness excused.

[Testimony of Charles Williams, for Defendant.]

CHARLES WILLIAMS, called and sworn as a witness in behalf of the defendant herein, testified as follows:

Direct Examination.

(By Mr. DAY.)

Q. What is your name, Mr. Williams?

A. Charles Williams.

Q. Where do you live?

A. I live in Aldridge.

Q. How long have you lived there?

A. I have lived there ten years.

Q. What is your occupation there at the present time?

A. Foreman of the mines of the Montana Coal & Coke Company.

Q. How long have you occupied that position?

A. Something like four years.

Q. What were you doing prior to that time?

A. Digging coal.

Q. For the Montana Coal & Coke Company?

(Testimony of Charles Williams.)

A. Yes, sir.

Q. How long have you worked for the Montana Coal & Coke Company?

A. I have worked for them all of that ten years, except about seven months; there was a strike, too, that lasted nine months, and you can call it a year and a half that I didn't work for them out of that time.

Q. During all the time you have been at Aldridge, you have worked for the company, except about a year and a half? A. Yes, sir.

Q. Had you ever worked in coal mines before coming to Aldridge? A. Yes, sir.

Q. Where had you worked?

A. All over the United States.

Q. What were your duties as mine foreman on the 23rd of September, 1907? What did you do as mine foreman?

A. Well, I used to go in and see around the mines once a day.

Q. Were your duties under ground or above ground? A. Under ground and above ground.

Q. Did you have anything to do with reference to where the men were to work, or anything of that kind?

A. No, sir; we left that to the inside man.

Q. Tell the jury what your duties were.

A. My duties were to go in and around the mines once a day, and see that everything was in condition when we would start a new place up, of course, I

(Testimony of Charles Williams.)

would have to go out and consult with Mr. Magraw about it.

Q. Do you know the scene of this accident that has been testified about here?

A. I was in the mines, but I was not there at the time.

Q. I didn't ask you if you were there at the time of the accident. I asked you if you knew the slant. Are you familiar with that slant there where the accident occurred? A. Yes, sir.

Q. You had seen it prior to the accident?

A. Yes, sir.

Q. How long before the accident had you been in there?

A. I was there the day before; I had not got there the day of the accident.

Q. You had not reached it at the time the accident happened? A. No, sir.

Q. Were you in there after the accident that day?

A. Yes, sir; I was in there after the accident.

Q. Do you know the plaintiff, Andrew Kovec?

A. Yes, sir.

Q. How long have you known him?

A. I couldn't tell you exactly. I have known him since he has been there in Aldridge.

Q. You have known him practically all the time since he has been in Aldridge? A. Yes, sir.

Q. Do you know of his working for the company at all? A. Yes, sir.

Q. How long has he worked for the company?

(Testimony of Charles Williams.)

A. I guess he has worked there about six or seven years.

Q. Did you ever work with him?

A. No, sir.

Q. Did he ever work under you? A. Yes.

Q. Where in the mines did he work under you?

A. He worked in the first slant. He was working under me when he got hurt. He worked in No. 4 under me.

Q. When, if you recall, did he work in No. 4 under you?

A. I couldn't answer that question. I don't know. I don't remember.

Q. Do you remember whether or not, at the time he was working under you in No. 4, you were hoisting coal by means of this engine? A. Yes, sir.

Q. Was it the same engine that was in this slant at the time he was hurt? A. Yes, sir.

Q. What was the custom with reference to the hoisting of coal by this engine in the operation of mine No. 4?

A. In the day time—that is, on the first shift—we had an engineer there. On the second shift there was a driver who was doing this work, and on the third shift, the diggers had to do it themselves.

Q. Did the diggers operate it on the third shift?

A. Yes, sir.

Q. Did you see them operating it there?

A. No; I didn't. I didn't see Andrew operating it.

(Testimony of Charles Williams.)

Q. I don't mean Andrew particularly. But did you see the diggers operate it on the third shift?

A. Yes, sir.

Q. How long did this state of affairs continue in mine No. 4?

A. Quite a few months; I couldn't tell you exactly how long.

Q. Now, what have you to say about No. 1 slant? How was the coal hoisted there?

A. It was hoisted there the same as it is hoisted to-day. It was hoisted by the engineer on the first shift, and the motorman hoisted on the night shift, from three to eleven, and the coal diggers hoisted from that time on until seven o'clock in the morning.

Q. That is in No. 1 slant? A. No. 1 slant.

Q. In the old mine? A. Yes, sir.

Q. Do you know whether or not Kovec worked on any of those night shifts in that slant?

A. Yes, sir.

Q. How long did he work in No. 1 slant?

A. He worked quite a few months there.

Q. How often were those shifts changed?

A. The shifts were changed every three weeks.

Q. Was this engine at No. 1 slant closed or was it open to the inspection of anybody coming along that entry, or coming out of the slant?

A. It was open.

Q. Could it readily be seen by miners walking along there?

A. Yes, sir; there was always lights on it, electric lights.

(Testimony of Charles Williams.)

Q. In passing along that entry, you could see the man operating it? A. Yes, sir.

Q. Now, as to the engine in No. 2 slant, was it possible for a man, in passing along that slant, to see the operation of the engine?

A. He couldn't help see it unless he turned his head away.

Q. How far away from the main traveled path was the engine?

A. From four to five feet. About five feet from where a man would be standing.

Q. Was any of its mechanism closed in any way so that it was not observable?

A. No, sir; nothing; nothing but the drum.

Q. How continuously was this engine operated in the slants during the time you were there?

A. You mean on the night shift?

Q. No; all the time.

A. They were running it every day.

Q. Taking it on the day shift, when the engineer was operating it, how continuously would they be hoisting coal?

A. Every fifteen or twenty minutes, I think.

Q. Take it on the shift when the driver was operating it, how often would they operate it?

A. That is what I just said.

Q. Well, then, when the engineer was operating it, how would it be?

A. He would be there all the time.

Q. When the miners were operating it, about how many cars would they draw up during a shift?

(Testimony of Charles Williams.)

A. From six to eight cars.

Q. Do you mean each of the sets of miners there would do that, or what? A. Just one set.

Q. Just one set? A. Yes, sir.

Q. How many men were there in a set?

A. Two.

Q. How many sets were working there?

A. Just one set. That is, on the night shift.

Q. On the night shift, there was only one set?

A. Yes, sir.

Q. You say you think Andrew had been working for the company something like six or eight years?

A. Something like that; six or seven years, I think. I am not sure. It is as long as I have been there.

Q. And how long did you say you have been there? A. About ten years.

Q. How long had these engines been in operation in the mine—that is, speaking of No. 4 and the old mine? A. About four years.

Q. Do you know whether or not there were any miners of the company who had been in the employ of the company longer than Kovec? A. Yes.

Q. Were there many, or was he one of the old men?

A. Well, he would be one of the old ones now. The old ones have mostly all left there.

Q. But at the time of the accident, he was one of the old employes of the company?

A. Yes, sir.

(Testimony of Charles Williams.)

Q. And had worked in all these various shafts, slants and inclines? A. Yes, sir.

Q. That is all.

Cross-examination.

(By Mr. NOLAN.)

Q. Those engines were not constantly in operation, were they?

A. Yes; they were constantly in operation.

Q. That is, they were constantly running?

A. Yes, sir.

Q. From morning until night?

A. Yes; if you got a man to run them.

Q. So that, really, then, if, for instance, you commenced at seven o'clock in the morning, and until two or three o'clock in the afternoon, if you went by this engine in the No. 2 slant at any time, it was working? A. No, sir.

Q. It was only working, as a matter of fact, at those times when they were hauling the cars up the slant? A. That is all.

Q. And at all other times, it was standing still?

A. Yes, sir.

Q. So that, if a person were going in there, and should go by the engine when it was standing still, he would not see it in operation, would he?

A. No, sir.

Q. Now, what I am trying to get at is, what proportion of the shift was that engine working, instead of standing still?

A. It was working when they had any empty cars to run.

(Testimony of Charles Williams.)

Q. It was working when they had empty cars to go down? A. Yes, sir.

Q. I thought those cars went down by gravity, without the use of the engine at all?

A. They went down with the engine.

Q. And it was also working when you brought the full cars up the slant? A. Yes, sir.

Q. At all other times, it was standing still?

A. Yes, sir.

Q. So that, really, a person going by there were to have an opportunity to see that operation, either empty cars would have to be going down, or full cars would have to be coming up? A. Yes, sir.

Q. And generally, when the men were going on or off shift, that engine was not working at all, was it? Just about the time when one shift of men went on, and another shift went off, the engine was not working at all, was it?

A. When the men went on in the morning, the engine was not working, but when they got off, the engine was working.

Q. Well, let us take the seven o'clock shift. When the men going on at seven o'clock in the morning were going to their work, the men on the shift before that were going off, were they not?

A. Yes; they were getting off about half past two, and the rope rider and the engineer would be pulling up cars, while they would be walking out. The rope rider and the engineer didn't quit until later, after the diggers quit.

(Testimony of Charles Williams.)

Q. Well, the fellows who were coming in on the succeeding shift would be coming in while the other men were going out? So that, really, when you were changing shifts, one bunch of men would be leaving the work, and another bunch of men would be coming on, the engine would be standing still, would it not? A. No, sir.

Q. Well, kindly tell us who would be working at that time.

A. You understand, a contract man is not supposed to work the full time, like a company man. We can not make him work the full time on that shift; he will quit work at half past two or three o'clock, whenever he gets the coal out. He is a contract man, and he gets paid for what he digs, and he does not have to work the full time. The other men, the company men, get paid so much a day, and they quit on that shift at the regular quitting time. The contract men won't work until that time; they quit when they get their coal out. They will be going out from half past two to half-past three, and they will see the engine working then.

Q. The men who are coming on shift are not working the engine until they get to work?

A. No, sir.

Q. So that, generally, when you are changing shifts is the time when that engine is likely to be at rest?

A. Yes; you have got it your way, but you haven't got it my way.

Q. Well, we will give you your way about it. Will you tell us how the men who are getting off

(Testimony of Charles Williams.)

shift are running the engine when they are getting off, and how the men who are getting on shift at that time are running it when they are coming on, or, in other words, while the change of shifts is taking place?

A. I will try to explain it to you again. All night shift work is company work. The men on that shift are supposed to be at their work at half-past three o'clock in the afternoon, because they are paid by the day. The miners, of course, were not particular about the time they quit, because they are contract men, and get paid for what they dig. Their last car may be out about half-past two; well, they go out; they don't wait until the company men quit; but they go out when they get their last car out, and that engine is in operation right then when they are going out.

Q. You say the miners go out at half-past two?

A. They go out all the way from two or half-past two to half-past three. You meet them going out between two o'clock and half-past three. That is, the contract men, the coal diggers.

Q. So that they have no specified time in which to go out; but they go out before the men who are working on the shift who are paid by the day?

A. Yes, sir.

Q. But even then, when they are going out, it does not follow at all that the engine is working, does it? A. Yes, sir.

Q. It would not be working unless at that particular time they happened to be hauling up loaded cars or letting down empties?

(Testimony of Charles Williams.)

A. That is what they are doing at that time. The engine is hauling up the last cars of the miners; but the miners are not digging coal when the last cars are hauled up; they are on their way out then. The coal diggers are on their road out.

Q. If they are on the road out, they can't see the engine working, can they? If these cars are brought up by the company men after the coal miners leave, there isn't a chance for the coal diggers to see the engine working, when they are going out?

A. They can follow the cars up if they want to; or they can go up ahead of the cars, if they want to.

Q. Do I understand you to say that they generally go up ahead of the cars, if they want to?

A. Yes; they can if they want to.

Q. The coal miners leave at two or half-past two, or a little later, and the company men leave at half-past three?

A. Yes; the company men have to work until half-past three.

Q. And it is after the miners leave that the company men go to work, and take those cars that the coal diggers have filled with coal, and bring them to the surface?

A. No, sir; that is not what I told you.

Q. Well, then, what are the company men doing during the hour or hour and a half between the time the miners leave and the time that the company men leave?

A. The company men are the men who pull the cars up. That is the driver. He has got to be there until quitting time.

(Testimony of Charles Williams.)

Q. I understand that; but what is he doing during the time that passes after the coal miners leave until the driver quits?

A. He takes up that coal that the miners have loaded. He is working until half-past three; he takes up that coal, all the coal that the miners left there.

Q. You don't pretend to say, from your own knowledge, do you, that the plaintiff in this case ever worked on one of those engines?

A. Yes, sir; he worked one of those engines.

Q. The plaintiff did? A. Yes, sir.

Q. When?

A. He worked in the first slant there.

Q. He worked the engine there?

A. Yes, sir.

Q. At what time?

A. He worked it on his shifts.

Q. Did you see him?

A. Yes, sir; I seen him. I seen him myself.

Q. When?

A. Well, he worked it when he was there. I can't tell exactly when it was.

Q. Didn't you say on your direct examination that you never saw him run that engine?

A. No, sir; I did not.

Q. You didn't? A. No, sir.

Q. Now, then, will you tell us when it was that you saw Kovec work the engine on No. 1 slant?

A. Well, I couldn't swear to the time. It has been close to two years; from a year and a half to two years, I should think.

(Testimony of Charles Williams.)

Q. What month was it?

A. I can't tell you what month it was.

Q. But you say it was close to two years. That would be in 1906 or 1907?

A. Yes; I guess it would be close to two and a half years. I couldn't swear when it was.

Q. On what shift was it?

A. He worked it on the three o'clock shift.

Q. You were foreman then? A. Yes, sir.

Q. Well, when was it on that shift? Was it toward morning, or was it soon after he went to work that you saw him?

A. I couldn't tell you that either. It must have been somewhere in the night, between seven and eleven.

Q. Before you just answered that question as you did, have you told the company about that, or have you told anybody about it? Did you tell Mr. Day about it?

A. No; I don't believe I did. He didn't ask me.

Q. He didn't ask you?

A. No; not about this particular engine in No. 1. He never asked me about that particular engine at all.

Q. How often did you see him work it?

A. I couldn't swear to that either. I might have seen him half a dozen times, or once or twice.

Q. Do you know who his partner was at that time? That is, who was working with him?

A. No; I don't know.

(Testimony of Charles Williams.)

Q. You say you might have seen him work it half a dozen times, or only a couple of times?

A. I have seen him at the engine running it, but I can't tell you how many times.

Q. Was he hauling up coal?

A. I couldn't tell you whether it was coal or rock.

Q. Can you tell whether it was coal or rock even?

A. I could tell if I should see it now in front of me; but I don't remember.

Q. Well, we can't get it now for you to examine.

A. It is pretty hard to say now whether it was rock or coal or mud.

Q. Were you talking to him at that time?

A. I don't know whether I talked to him or not.

Q. As foreman, you are on duty, are you, in the night, as well as in the daytime?

A. In the night-time, or any time that I have to go in there, when there is anything wrong, or if there are any men that I want to see.

Q. Do you know whether there was anything wrong that called you in there in this particular instance when you saw the plaintiff, as you say, running the engine?

A. No, sir; I don't. There must have been something, or else I wouldn't be in there.

Q. Of course, it was in the night-time, or you wouldn't have been in there. But will you tell us what it was that got you out of bed in the night-time, and took you in there?

A. I know I was in there. I don't know that I was in bed.

(Testimony of Charles Williams.)

Q. What time did you say it was?

A. I didn't say the time. It was on the three o'clock shift.

Q. That would be between what hours?

A. Between three o'clock in the afternoon and eleven o'clock at night.

Q. Don't you know, as a matter of fact, that, under the custom that prevailed there at that time, they had drivers to operate the engine?

A. No, sir.

Q. During that time, they had drivers, didn't they? A. No, sir.

Q. It was only the shift between eleven o'clock at night and seven in the morning that the work was done by the coal miners?

A. Yes; and there was months there that there was no driver at all on the three o'clock shift.

Q. You heard the testimony of Mr. Magraw when he was on the stand here, didn't you?

A. Yes, sir.

Q. There was a custom there, was there not, in connection with the operations carried on in No. 1 slant, that for one shift there was an engineer, for another shift the drivers took care of the engine, and in the case of the third shift the miners themselves ran the engine? A. Not always.

Q. Not always?

A. No, sir. If we had only two men working in No. 1 slant, it wouldn't pay the company to keep a driver there to attend to them.

(Testimony of Charles Williams.)

Q. That is, you are speaking with reference to the shift on which the driver was sometimes employed. That is to say, this custom you speak of, was simply effective and was changed whenever the needs of the company demanded it in the matter of expense? A. Yes, sir.

Q. That is, whenever it would entail any loss upon them in connection with the carrying on of the operations, they changed the custom? A. Yes, sir.

Q. Do you know how many men were working down there the night that you saw the plaintiff working that engine?

A. No, sir; I couldn't swear to that either.

Q. You don't know whether it was during a time when this custom that you speak of was off or on?

A. It was off, because he was running the engine; if it had been on, he would not be running the engine.

Q. Do you know whether it was nearer to eleven o'clock in the night, or nearer to the three o'clock in the afternoon when you were down there on this occasion and saw him do this?

A. It must have been in the early part of the evening; I never go in there after nine o'clock, anyhow.

Q. But you have said you would go in there if there was something wrong?

A. Yes; if there was something wrong. But when there was nothing wrong, I have been in the mine until seven o'clock before I came off my shift, and that would be quitting time.

(Testimony of Charles Williams.)

Q. And if I understood you correct, a short time ago you said that there must have been something wrong at the time you were in there and saw the plaintiff running the engine, or else you would not have been in there?

A. That is right; I would not have been in there unless there was something wrong.

Q. But you can't tell us what it was that was wrong? A. Yes, sir.

Q. This was about two years ago?

A. I don't remember exactly. About a year and a half ago. Something around a year and a half ago, or two years.

Q. You have a distinct recollection of seeing Kovec run that engine this once, and you say that you might have seen him run it half a dozen times, or it might be once or twice or three times that you saw him run it?

A. I have been in there a good many times after my shift was over. I might be inside there doing something or looking after something.

Q. You are getting away from the question. Every time you were in there, you didn't see Kovec at the engine, did you?

A. I don't know about that either. I told you I had seen him at the engine, but I can not say how many times I have seen him at the engine.

Q. That is all.

Witness excused.

By Mr. DAY.—The defendant rests.

REBUTTAL.

[Testimony of Andrew Kovec, for Plaintiff, in Rebuttal.]

ANDREW KOVEC, the plaintiff herein, called as a witness in rebuttal, testified as follows:

Direct Examination.

(By Mr. NOLAN.)

Q. Mr. Kovec, there is evidence here that during the time that you were in No. 4 mine, the work of hoisting the cars and running the engine on one shift was done by the coal miners. You heard that testimony, didn't you?

A. On the day day, I don't know who it was, whether it was the engineer or driver that pulled up the cars; on the eleven o'clock shift, they were pulled out by the driver; I know that.

Q. And on the other shift, by whom was the engine worked?

A. We had a side place to dump those cars; the driver brought in the cars, and we dumped about six or eight cars on the side, and then we loaded those cars, and we had something to do inside.

Q. During the time that you were in the No. 4 mine, who was your partner?

A. Mr. Frank Strutsel is his name.

Q. During that time, did you ever have anything to do with the running of the engine?

By Mr. DAY.—To which we object as not proper rebuttal, for the reason that this witness testified in his case in chief that he never operated the engine in No. 4 mine.

(Testimony of Andrew Kovec.)

The COURT.—The objection is sustained.

Q. Who was it that handled the engine at that time?

By Mr. DAY.—To which we object as not proper rebuttal, as he went into that fully in his case in chief.

The COURT.—The objection is sustained.

By Mr. NOLAN.—Note an exception.

Q. Did you at any time, and especially within a year and a half or two years ago, operate the engine on the No. 1 slant? A. No.

Q. That is all.

Cross-examination.

(By Mr. DAY.)

Q. Did you ever see the engine on No. 1 slant operated? A. No.

Q. With whom did you work in the No. 1 slant?

A. Tony Vassar.

Q. On what shift did you work?

A. I worked on the day shift, and three o'clock shift, and when it changed to the eleven o'clock shift, too.

Q. Who hoisted the coal on the eleven o'clock shift?

A. It was hoisted by my partner when I was working on the eleven o'clock shift.

Q. You never helped him in any way?

A. I just went with the car up and down to the switch.

Q. He ran the engine, and you went up and down with the cars? A. Yes, sir.

(Testimony of Andrew Kovec.)

Q. How long did you work there in No. 1 slant with Tony Vassar?

A. I worked there pretty nearly a year.

Q. How old a man was Tony Vassar?

A. He was about thirty-five, or something like that.

Q. About thirty-five years old?

A. Yes, sir.

Q. How long was he working for the company?

A. He was working there a long time, too; I don't know how long it was.

Q. And he always ran the engine?

A. Yes, sir.

Q. And you always went up with the cars?

A. Yes, sir; on the eleven o'clock shift.

Q. On the eleven o'clock shift?

A. Yes, sir; I worked with him in the rooms, too; not all the time in that place.

Q. But in various places around that part of the mine? A. Yes, sir.

Q. You were mining coal? A. Yes, sir.

Q. That is all.

Redirect Examination.

(By Mr. NOLAN.)

Q. Do you know where Tony Vassar is?

A. He is up there yet.

Q. Up at Aldrich? A. Yes, sir.

Q. Working for the company? A. Yes, sir.

Q. That is all.

Witness excused.

By Mr. NOLAN.—That is all the rebuttal, if the Court please.

The foregoing was all the evidence and the only evidence introduced at the trial of said cause.

[Motion to Instruct Jury to Return Verdict for Defendant, etc.]

By Mr. DAY.—Comes now the defendant, at the close of the entire testimony, and moves the Court to instruct the jury to return a verdict for the defendant upon the following grounds:

(A) There is no evidence to show that the plaintiff was required to operate the engine in question at the time he undertook to operate it.

(B) The evidence shows that the danger from operating the engine with an exposed cog-wheel was obvious and ordinary, and such as were apparent to an ordinarily prudent person, for which reason the plaintiff assumed the risk incident to such employment.

(C) The evidence shows that the danger from operating the engine with an exposed cog-wheel was obvious and ordinary, and the plaintiff accepted the employment without protest or promise of assistance or instruction.

(D) The evidence shows that the proximate cause of the injury to plaintiff was due to the negligence of the plaintiff in the manner of putting his foot upon the brake.

(E) There is no evidence to show that injury to the plaintiff was proximately caused by the failure of the defendant to instruct the plaintiff in the oper-

ation of the engine, and the dangers to be guarded against.

The foregoing motion was thereupon denied by the Court.

To which ruling of the Court the defendant, by its counsel, then and there excepted.

(Noon recess.)

Two o'clock P. M.

(After argument to the jury by counsel for the respective parties, the Court instructed the jury as follows:)

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Instructions [of the Court to the Jury].

HUNT, Judge (Orally):

Gentlemen: This action is what is termed an action at law in negligence. We find that there are a great many of them to try in the courts now, largely because of the industrial progress of modern times. Men are compelled to deal with machinery more or less complicated in the performance of their duties; accidents happen; and actions are instituted, the parties alleging that they have been injured, and that the employers are responsible to the employees

for the injuries because of certain duties that may have been neglected by the employers. We must approach the consideration of such questions always mindful of their importance to employer and employee. In this case, the plaintiff lost his hand, and, of course, suffered a great deal; the very nature of the accident would indicate to us that his suffering must have been terrible at the time. He alleges that the cause of his injury was the negligence of the defendant. It is of great importance to him that his rights be maintained, if he has established them. On the other hand, it is of great importance that the law should not impose the payment of one farthing upon a defendant operating machinery, unless it is legally liable for the violation of some duty. The plaintiff and the defendant stand equal before the law. The fact that our sympathies may be aroused is not material to the case. The case must be decided under the evidence, when we apply correct principles of law to the testimony that we have heard. So, mindful of the rights of the parties, and that they are on an exact equality, whether one be poor and one be rich, let us take up the matters for your consideration.

I will state to you the pleadings, in so far as they are pertinent. The plaintiff, Kovec, alleges that prior to the 23d day of September, 1907, he was in the employ of the defendant, Montana Coal & Coke Company, as a common miner in the mines of the defendant at Aldridge, Montana; that one Louis Testovarsnik was foreman or shift boss and had supervision over the plaintiff; that on the 23d day of

September, 1907, while he was employed as a common miner, the plaintiff was directed by Louis Testovarsnik to take charge of and operate a certain electric hoisting engine used in the operation of the mines; that he expressed doubt as to his ability to operate the engine, but that he was persuaded to do so, and while engaged in operating the engine, he sustained the injury of which he complains. Plaintiff alleges that he was directed to take charge of the engine and to operate it, with full knowledge on the part of the defendant—that is, with full knowledge on the part of Louis Testovarsnik, who would be, for the purposes of this suit, the defendant,—that he was ignorant and had no experience in the operation of such an engine, and that he was no engineer, and with the knowledge possessed by the defendant that the running of the engine was dangerous and that the plaintiff did not know anything about the dangers attending the operation of the engine, and that the defendants did not instruct the plaintiff how to manage or operate the engine, and that the plaintiff was not advised or warned of the dangers attendant upon its operation. He alleges further that the defendant was negligent in directing him to operate the engine without first having instructed him as to the mechanism of the engine, and as to how the same was operated; and that the defendant was negligent in not warning him of the dangers to an inexperienced man in running such an engine. He alleges that while he was operating the said engine on the 23d of September, 1907, pursuant to the directions he had received, it became neces-

sary for him to stop and shut off the power of the said hoisting engine, and while he was attempting to do so, he was obliged to place his foot upon the brake of the said engine, and that in so attempting to put his foot upon the brake of the engine, on account of its vibrating he missed the brake and fell into the gearing of the engine, which was in close proximity to where he was standing; and that his right hand was caught in the gearing, and was taken off at the wrist. He alleges that the gearing referred to had no guards or protection, and was left exposed, and that this fact was known to the defendant; that it was the duty of the defendant, in the exercise of reasonable diligence, to have had the gearing protected by guards; but that it failed in this respect. He alleges further that the defendant was negligent toward him in ordering and compelling him to operate the engine, knowing that he was inexperienced in operating such a machine, and that he was not conversant with the mechanism and handling and operation thereof, and in not having advised him as to the dangers incident to the operation of the engine, and in not having instructed him how to operate it. He alleges that it was negligence on the part of the defendant in not having the gearing on said engine guarded. In other words, the plaintiff alleges two grounds upon which he claims that the defendant was responsible: One is that it failed, under the facts, to advise and warn him as to the risks and dangers to which he was exposed in operating the machine; the other is that it failed in its duty toward him in not having the gearing properly

guarded. Plaintiff alleges that he will never be able to perform any physical labor, because of his injury, and he asks for thirty thousand dollars damages.

The defendant, in its answer, admits that Kovec was in its employ at the time he was injured, and admits that he was injured while operating the engine in question; but denies all the other allegations of the plaintiff. The defendant sets up that at the time the plaintiff was injured, he was a man of ordinary intelligence and good understanding, and that he was familiar with the operation of the hoisting engine, and was advised as to the operation of the brake, and was likewise fully advised that the gearing was exposed. The defendant avers that, at the time of the injury to the plaintiff, the hoisting engine was in good condition, and was perfectly safe for operation by persons using ordinary care; and that in operating the engine, as he did, Kovec assumed all the risks of personal injuries, including the one of which he complains, incident to the operation of said engine. The defendant also sets up the defense that the machine in question was in perfectly safe condition for use, that the machinery connected with the engine was amply protected and enclosed, and that it was perfectly safe to an operator of the engine using ordinary care; that the plaintiff, prior to the date of his injury, had frequently used the engine in the hoisting of coal, and was fully instructed and advised as to the care and caution to be exercised in its operation; and that on account of his own carelessness and negligence, he missed the brake, and came in contact with the gearing which

caused his injury. The defendant sets up what are known as affirmative defenses—assumption of risk and contributory negligence.

In his replication, the plaintiff denies that he assumed the risk of being injured as he was, and denies that his own negligence in any manner contributed to the accident.

There are some general principles that it is well for you to remember in considering the testimony. A plaintiff who alleges negligence assumes the burden of proof. That is to say, there is no presumption of negligence arising out of the accident itself. There are some instances where presumptions of negligence arise, and at once throw the burden upon a defendant who is charged with negligence. The simplest illustration of that that comes to my mind is in the case of a collision between two railroad trains. If a man is injured in a collision, when one train runs into another, the law presumes negligence, and at once throws the burden upon the defendant to show that it was free from negligence. But in a case of this kind, the mere fact that the plaintiff lost his hand does not raise a presumption of negligence. He alleges negligence, and the ordinary rule that prevails in civil suits obtains, and casts upon him the burden of proving negligence by a preponderance of the evidence. A preponderance of the evidence means the greater weight of evidence. It does not necessarily mean the greater number of witnesses. Sometimes one man may swear to a state of facts, and five, ten, or fifteen may swear directly the contrary; yet if the jury believe

what that one man says, they have a right to accept his testimony as truthful, and to reject,—if they do not believe,—the testimony of the other five, ten or fifteen. The exclusive province of the jury is the weighing of testimony, the ascertainment of truth, testing the credibility of witnesses, determining for themselves who is accurate, who is mistaken, where falsehood may be, and where truth may be. The judge cannot help you in that. He can only lay down such principles of law as may assist you, but when it comes to weighing facts, that is your province.

Negligence is defined as conduct which common experience or special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, althought it was not certain, intended or foreseen. It is really an omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a reasonable and prudent man would not do. It is to be determined in all cases by reference to the situation, and knowledge of the parties and the attendant circumstances. As I have told you, the plaintiff takes it upon himself to prove negligence by a preponderance of evidence. It is conceded in this case that Kovec was in the employ of the defendant company.

There are certain duties which the law imposes upon a master toward his servant, in reference to providing for him a reasonably safe place in which to

work, and reasonably safe appliances with which the work may be done. The servant has the right to assume that the master has used due diligence to provide suitable appliances for the operation of his business, and does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's method of prosecuting his business, but he may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of such knowledge without objection, without assuming the hazard incident to such a situation. In other words, if he knows of the defect, or if it is so plainy observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and if, in such a case, he is injured through the use of such defective apparatus, he cannot recover. You will remember that the law does not impose upon the master the necessity of providing machinery or appliances which are absolutely safe. It imposes upon him the obligation to use reasonable and ordinary care, skill and diligence in procuring, furnishing and maintaining suitable and safe machinery.

When a servant enters into the service of an employer, he impliedly agrees that he will assume all

the risks which are ordinarily and naturally incident to the particular service, in which he engages, and if, in this case, you believe that the injury to Kovec was only the result of one of the risks ordinarily incident to the work in which he was engaged, and not otherwise, then he can not recover, and your verdict should be for the defendant;

The question of assumption of risk is perhaps best understood when we consider the many employments which men seek. Some are very hazardous. Mining is a hazardous employment. When a man goes into mining, he takes upon himself those risks which are ordinarily connected with the business of mining. When a man works in a smelter or other places where streams of molten metal are coming out, he undertakes a very hazardous employment. The nature of the business, in itself, is hazardous, and he goes into it assuming those risks which are ordinarily incidental to the business so undertaken by him.

The law imposes upon the master the degree of care that I have explained to furnish reasonably safe appliances, and it imposes upon the servant the duty of exercising ordinary care to prevent being injured. The duties are correlative. Duties are imposed upon master and upon servant. Common experience tells us this. We think of the situations that are presented to men in factories undertaking employment where they are surrounded by dangerous machinery. The law must require the care commensurate with the nature of the business on the

part of the master, and the care commensurate with the nature of the business on the part of the servant.

I think I have already told you that when the servant, in accepting his employment, he does not assume those occasioned by the negligence of the master. In this case, Kovec assumed the ordinary risks incident to the work he was called upon to perform; yet he did not assume those,—if there were any such,—arising from the negligence of the defendant company. You will remember that Kovec says that he was employed as a coal digger, and was acting in that capacity in the employ of this defendant; that he was never employed by the defendant to operate machinery, and never represented to the company, either expressly or impliedly, that he had any knowledge of machinery; and that on the day of the accident, he was directed by the representative of the company to operate the hoisting machine; that the work connected with its operation was dangerous; and that he was ignorant, through inexperience, of these dangers; all of which facts, he says, were known, or by the exercise of reasonable diligence, could have been known, by the defendant. If you find these facts to be true, then the duty devolved upon the defendant company, before exposing the plaintiff to such dangers, to instruct and caution him in such a manner that he would be able to comprehend such dangers, and do the work with reasonable safety and proper care on his part. If you find from the evidence that these are the facts, and that the injury complained of by Kovec, resulted from this failure to instruct him, he would be entitled to re-

cover, unless you should find that in operating the engine in question, he assumed the risks incident to its operation, as explained to you, or unless the injury that he received was the result of contributory negligence on his own part.

Now, a master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he was engaged, and against which, the servant, through want of skill, could not presumably defend himself if not advised of danger. He is bound to warn the servant of the danger, if it is not obvious, and to instruct him how it may be avoided. But if the servant be of mature years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such cases the master is not liable for injury happening to the servant in the performance of dangerous work, without the scope of his ordinary employment, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and, without objection, undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. The liability upon the master in cases of injury to the servant received in a dangerous employment outside of that for which he was originally employed, arises not from the direction of the master to the servant to depart from the original service, and engage in the more dangerous work, but from the failure of the master to warn the servant of the attendant danger in cases where

the danger is not obvious, or where the servant is unable to comprehend the danger. The master is under no obligation to warn against dangers which are obvious and ordinary; but the master owes the duty to the employee who is directed to perform a hazardous or dangerous task, or to work in a dangerous place, when the employee, through inexperience or general incapacity, does not comprehend the dangers, and this inexperience or general incapacity is known to the master, or by the exercise of reasonable diligence could be known, to point out to the servant the dangers incident to the employment, and thus enable him to comprehend, and so avoid them. A neglect to discharge such duty renders the master liable for such injuries as the servant may sustain through the failure of the master to so instruct and advise. And it is for you to say, after weighing all the evidence in the case, whether the operation of the hoisting engine in question, in the manner in which it was operated, and the circumstances connected with its operation, was hazardous and dangerous, so as to have required the defendant to have instructed Kovec, and whether or not the plaintiff was inexperienced and lacking in capacity.

The contention is also made by the plaintiff that the defendant company was negligent in not providing a suitable cover or shield for the gearing into which his hand fell. As I have explained to you, the master is required to exercise reasonable care in providing a reasonably safe place for the servant to work, and reasonably safe appliances and machinery with which to work, and if the master proves negli-

gent in that duty, and the servant is injured on account thereof, he is entitled to recover for such injuries as he may sustain unless he was guilty of contributory negligence, or unless he assumed the risk from its use in the situation in which it was. As to whether he assumed the risk, it is proper for the jury to consider where the gearing was, and whether or not he was required to come in contact with it in the ordinary operation of the machine.

The defendant contends that the injury which Kovec received was brought about by his own contributory negligence. That is to say, that through his own neglect, he contributed directely to the injury which he received. Now, contributory negligence is an affirmative defense. The duty of the plaintiff is to make out a case of negligence against the defendant, and if the defendant comes into court and says that the plaintiff was guilty of contributory negligence, upon that defense the defendant assumes the burden. If you find, in considering all the evidence, that the plaintiff was guilty of contributory negligence in attempting to operate the machine in the manner in which he did, letting his foot slip, or if he missed the brake by reason of carelessness on his part, and thus contributed to the injury that he received, he can not recover. If you believe that the foreman ordered Kovec to operate the engine in question, but did not instruct him in the method of its operation, that order would not relieve the plaintiff from exercising the care and prudence that an ordinarily careful person would exercise under the circumstances, and if the plain-

tiff did not understand the operation of the engine, yet did not exercise the care that an ordinarily prudent man would have exercised, under the circumstances, but without knowing how to operate the engine, undertook to run it, and negligently and carelessly undertook to put his foot upon the brake, and by reason of his negligence in so doing, fell or was thrown into the gearing of the machine, and that his negligence in attempting to operate the engine and in attempting to put his foot upon the brake, was the proximate cause of the injury he received, then the plaintiff is not entitled to recover. That is to say, gentlemen, it comes back to the proposition that the duty of the servant is a correlative one. He must exercise care to avoid injury to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or as are discernible by ordinary care on his part, as the master is to provide for him. A man can not go blindly into a terrible danger, and, if he is injured, hold his employer, but whether he does go blindly into it is a question of fact. Now, consider whether or not Kovec was told to operate that engine; consider the engine; consider the brake; the gearing was exposed; there is no question about that. But it seems to me that you will find the more material matter in the case to be the question of the operation of the machine by the brake. Consider whether the plaintiff acted as a man of ordinary prudence would have acted; whether or not, when he saw the exposed gearing, he acted as a man of ordinary prudence and care would not have acted.

Those are questions to be arrived at by a fair consideration of all the evidence there is in the case. You may believe that the plaintiff was not employed to do the work in which he was engaged at the time of the injury, yet if you believe that he engaged in the work without objection, and that the risks and dangers thereof were open and patent to his sight and understanding, then he occupies the same position he would have occupied if he had been originally employed to run the engine, and if he was injured by reason of such open and patent risk,—if there was any such,—his injury was the result of risks which were assumed by him, and he is not entitled to recover.

Now, after weighing the evidence, gentlemen, if you find that he has sustained his averments as to negligence by a preponderance of the evidence, you will then proceed to consider the question of damages. If you find he has not proved negligence, or if you find that he contributed directly to his injury, or that he assumed as an ordinary risk of his employment the risk of being hurt, then you should find for the defendant. If you find for the defendant, that will end the case. But if you find for the plaintiff, you will then proceed to consider the question of damages.

Now, in the assessment of damages, the law trusts very largely to the sound judgment and good fair-minded sense of twelve men. Damages are not given in a case of this kind by way of punishment of a defendant. There is no question of that kind involved.

They are given, in so far as the law can measure a standard of damages, as a monetary compensation for the pain and suffering that may have been endured by the party who has been injured, and in a sum to compensate him for his impaired capacity to earn money in the future. First, damages may be awarded for such pain and suffering as the plaintiff has endured, or which the evidence shows he is reasonably certain to endure in the future, if any, on account of any injury he has sustained. Second, for any loss of capacity to earn money or wages, which has resulted to him from the injury he has received. And third, for any disfigurement due to his injury.

In reaching a conclusion as to the amount which may be assessed to the plaintiff on account of his diminished capacity to labor, it is proper to take into consideration the evidence offered in reference to the expectancy of life and the cost of an annuity for a man at the age plaintiff was when he was injured,—I believe he said he was twenty-nine years old at that time,—and if you award him any damages under this head, you may award him such an amount on account of such diminished capacity, as would purchase an annuity equal to the difference between what he could have earned annually, had he not been injured, and his earning capacity in view of his injuries, considering at the same time whether or not his earning capacity would have diminished in time, owing to advancing years. You will remember that Mr. Poznanski was called to testify as to the expectancy of life of a man at the age of Kovec, and that certain mortality tables that he read from were admitted in

evidence before you. These tables are not binding upon you. They are admissible as competent aids to a jury in arriving at results in case they measure damages. You might think that they were perfectly competent for a period of time; you might consider that a man in advancing years might or might not earn so much money, or that he might or might not require so much for his support. Consider what he has been earning, and what he would reasonably earn, looking ahead some years.

All twelve of you must concur in any verdict that is rendered. I will give you two forms of verdict. Whichever expresses your finding, you will, by your foreman, sign, and bring into court.

(Addressing Counsel:) You may dictate to the stenographer any exceptions you have to the charge.

By Mr. NOLAN.—I don't think I have any exception to take to the instructions, if the Court please.

By Mr. DAY.—We have no exception to the charge; only our exception to the ruling of the Court denying the defendant's motion to instruct the jury to return a verdict for the defendant.

The COURT.—(Addressing Jury.) You may retire, gentlemen.

(Whereupon at five o'clock P. M., the jury retired to consider of their verdict.)

Thereafter the jury returned into court, with their verdict, which verdict is in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 884.

ANDREW KOVEC,

Plaintiff,

vs.

THE MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Verdict.

We, the jury in the above-entitled cause, find in favor of the plaintiff and assess his damages in the sum of Five Thousand ($5,000.00) Dollars.

Dated January 9th, 1909.

E. H. BRANDEGEE,
Foreman.

And now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed, and signed and certified by the Judge as provided by law.

Feby. 13, 1909.

O. M. HARVEY, and
CARPENTER, DAY & CARPENTER,
Attorneys for Defendant.

[Order Settling and Allowing Bill of Exceptions.]

I hereby certify that the above and foregoing Bill of Exceptions is a true Bill of Exceptions, and order that the same be signed, settled, allowed and filed this 13th day of March, 1909.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Filed March 13, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of March, 1909, defendant filed its Assignment of Errors herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled action, and files the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above-entitled action:

1. The Court erred in overruling defendant's motion for nonsuit made at the close of the testimony in behalf of plaintiff, for the reasons set forth as the grounds of said motion.

2. The Court erred in overruling the defendant's motion to instruct the jury to return a verdict for the defendant made at the close of the entire testimony, for the reasons set forth as the grounds of said motion.

In order that the foregoing assignment of errors may be and appear of record, the defendant presents the same to the Court, and prays that such disposition may be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and that the judgment of the Circuit Court of the United States for the District of Montana be reversed and the said Circuit Court be directed to grant a new trial of said cause.

CARPENTER, DAY & CARPENTER,
Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Mar. 15, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 15th day of March, 1909, defendant filed its Petition for Writ of Error herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Petition for Writ of Error and Supersedeas.

The Montana Coal and Coke Company, the defendant in the above-entitled cause, feeling itself ag-

grieved by the verdict of the jury, and the judgment entered thereon on the 9th day of January, 1909, comes now by Carpenter, Day & Carpenter, its attorneys, and petitions said court for an order allowing the said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give, and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

CARPENTER, DAY & CARPENTER,
Attorneys for Defendant.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error and Supersedeas. Filed Mar. 15, 1909. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 15th day of March, 1909, an Order Allowing Writ of Error was duly made and entered herein in the words and figures following, to wit:

At a stated term, to wit, the October term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the District of Montana, held at the court-room in the City of Helena, State of Montana, on Monday, the 15th day of March, in the year of our Lord, one thousand nine hundred and nine. Present, the Honorable WM. H. HUNT, District Judge, sitting as Circuit Judge.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error.

Upon motion of Messrs. Carpenter, Day & Carpenter, Attorneys for Defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at seventy-five hundred dollars.

March 15th, 1909.

WILLIAM H. HUNT,

Judge.

[Endorsed]: Title of Court and Cause. Order Allowing Writ of Error. Filed and entered March 15, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of March, 1909, an Order Fixing Amount of Bond was duly made and entered herein, in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Order Fixing Amount of Bond.

The defendant, the Montana Coal & Coke Company, having this day filed its petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth

Judicial Circuit, and said petition having this day been duly allowed:

Now, therefore, it is ordered that upon the said defendant, the Montana Coal & Coke Company filing with the Clerk of this Court a good and sufficient bond in the sum of seventy-five hundred dollars to the effect that if the said defendant, the Montana Coal & Coke Company, the plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this Court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated March 15, 1909.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Order Fixing Amount of Bond. Filed and Entered March 15, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of March, 1909, Bond on Writ of Error was filed herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Bond on Writ of Error.

Know All Men by These Presents: That we, the Montana Coal & Coke Company, as principal, and the National Surety Company, a corporation organized and existing under the laws of New York and authorized to become sureties upon bonds and undertakings in the Circuit Court of the United States, as surety, are held and firmly bound unto Andrew Kovec, plaintiff above named, in the sum of seventy-five hundred dollars, to be paid to the said Andrew Kovec, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 15th day of March, 1909.

Whereas, the above-named defendant, Andrew Kovec, has sued out a writ of error to the United

States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the United States for the District of Montana.

Now, therefore, the condition of this obligation is such, that if the above named Montana Coal and Coke Company shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof, the said parties have caused these presents to be signed in their corporate name the day and year herein first above written.

MONTANA COAL & COKE COMPANY,
By CARPENTER, DAY & CARPENTER,
Its Attorneys.

NATIONAL SURETY COMPANY,
By R. A. FRASER,
A. L. SMITH,
Attorneys in Fact.

Foregoing bond approved this 15th day of March, 1909.

WM. H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Bond on Writ of Error. Filed March 15, 1909. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of March, 1909, a Writ of Error was duly issued herein, which said Writ of Error is hereto annexed, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,

Plaintiff,

vs.

MONTANA COAL & COKE COMPANY (a Corporation),

Defendant.

Writ of Error [Original].

United States of America.—ss.

The President of the United States, to the Honorable the Judge of the Circuit Court of the United States, for the District of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between the Montana Coal & Coke Company, the plaintiff in error, and Andrew Kovec, the defendant in error, a manifest error hath happened, to the great damage of the said Montana Coal & Coke Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then

under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, on the 29th day of April, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 15th day of March, in the year of our Lord, one thousand nine hundred and nine.

[Seal] GEO. W. SPROULE,
Clerk of the United States Circuit Court for the Ninth Circuit, District of Montana.

Allowed by: WILLIAM H. HUNT,
District Judge.

Service of the within writ of error and receipt of a copy thereof is hereby admitted this 15th day of March, 1909.

J. F. O'CONNOR,
WALSH & NOLAN,
Atorneys for Defendant in Error.

Return to Writ of Error.

ANSWER OF COURT TO WRIT OF ERROR.

The Answer of the Honorable, the Circuit Judges of the United States, Ninth Circuit, in and for the District of Montana, to the foregoing Writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said Circuit Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 884. United States Circuit Court, District of Montana. Andrew Kovec, Plaintiff, vs. Montana Coal & Coke Company, a corporation, Defendant. Writ of Error. Filed March 16, 1909. Geo. W. Sproule, Clerk. Carpenter, Day & Carpenter, Attorneys for Defendant.

And thereafter, to wit, on the 15th day of March, 1909, a Citation was duly issued herein, which said Citation is hereto annexed, being in the words and figures following to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ANDREW KOVEC,
Plaintiff,

vs.

MONTANA COAL & COKE COMPANY, (a Corporation),
Defendants.

Citation [on Writ of Error—Original].

United States of America,—ss.

To Andrew Kovec, Greeting:

You are hereby cited and admonished to be and appear, at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, on the 29th day of April, 1909, pursuant to a Writ of Error, filed in the Clerk's office of the Circuit Court of the United States, Ninth Circuit, District of Montana, wherein the Montana Coal & Coke Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated March 15, 1909.

WILLIAM H. HUNT,
Judge.

Due and timely service, and a copy of the foregoing citation acknowledged, this 15th day of March, 1909.

J. F. O'CONNOR,
WALSH & NOLAN,
Attorneys for Andrew Kovec, Defendant in Error.

[Endorsed]: No. 884. United States Circuit Court, District of Montana. Andrew Kovec, Plaintiff, vs. Montana Coal & Coke Company, a Corporation, Defendant. Citation. Filed March 16th, 1909. Geo. W. Sproule, Clerk. Carpenter, Day & Carpenter, Attorneys for Defendant.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 262 pages, numbered consecutively from 1 to 262, inclusive, is a true and correct transcript of the pleadings, process, orders, judgment, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said Court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included with said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of two hundred seven 20/-100 dollars ($207.20/100), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at Helena, Montana, this 25 day of March, A. D. 1909.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1705. United States Circuit Court of Appeals for the Ninth Circuit. The Montana Coal & Coke Company (a Corporation), Plaintiff in Error, vs. Andrew Kovec, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Montana.

Filed March 31, 1909.

F. D. MONCKTON,
Clerk.

No. 1705.

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE MONTANA COAL & COKE COMPANY,

(A Corporation),

Plaintiff in Error,

vs.

ANDREW KOVEC,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CARPENTER, DAY & CARPENTER,

Attorneys for Plaintiff in Error.

FILED
OCT 11 1909

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE MONTANA COAL & COKE COMPANY,
(A Corporation),

Plaintiff in Error,

vs.

ANDREW KOVEC,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error sued out by the Montana Coal & Coke Company to review a judgment for $5000 and costs recovered against it in the District Court of the United States, Ninth Circuit, District of Montana, in an action brought by Andrew Kovec to recover damages for injuries received while working in the coal mine of plaintiff in error, resulting in the loss of his right hand at the wrist. The negligent acts are set forth in the Complaint as follows: (Trans. p. 2.)

II.

That prior to the 23d day of September, 1907, the plaintiff was in the employ of the defendant, Montana Coal & Coke Company, as a common miner in the mines of said company at Aldridge, Montana; that likewise the defendant Louis Testovarsnick, was at said time employed by the defendant, Montana Coal & Coke Com-

pany, as foreman or shift boss, and that he had charge of and supervision over certain of the men employed in said mines by the said defendant, Montana Coal & Coke Company, among which men that the said defendant, Louis Testovarsnick, had supervision over was this plaintiff.

III.

Plaintiff alleges that on or about the 23d day of September, 1907, and while this plaintiff was employed as aforesaid as a common miner, the defendant instructed and directed this plaintiff to take charge of, and operate a certain hoisting electric engine which was used in the operation of said mines by the said defendant, the Montana Coal & Coke Company. That the plaintiff expressed a doubt as to his ability to operate said engine, as he was no engineer, and knew absolutely nothing about the mechanism of an engine, and objected to taking charge of said engine, but was assured by the defendants that he was qualified to take charge of this work, and was persuaded by said defendants to proceed to operate the said engine belonging to said company as aforesaid, and did operate said engine up to the time of the accident hereinafter referred to.

IV.

That the defendants instructed this plaintiff to take charge of said hoisting engine as aforesaid, with full knowledge that the plaintiff was ignorant and had no experience in the operation of such an engine, and was no engineer, and knew that the running of said engine was dangerous and knew that the plaintiff did not know anything about the dangers attending the operation of said engine, and that the said defendants did not in any way instruct the plaintiff how to manage or operate said

engine, and did not advise or warn the plaintiff of the dangers attendant to the operation of such an engine, but merely compelled him to take charge of, and run said engine.

V.

That the said defendants, Montana Coal & Coke Company and Louis Testovarsnick, were negligent in directing and compelling this plaintiff to operate said engine without first having fully instructed him as to the mechanism of said engine, and as to how the same was operated, and that they were negligent in not warning the plaintiff of the dangers to an inexperienced man running such an engine, and that it became and was the duty under the circumstances herein set forth, and in the exercise of due care on the part of said defendants toward the plaintiff to fully instruct the plaintiff as to how the said engine was managed, and should have warned the plaintiff as to the dangers attendant to the handling and operation of such an engine, but that the said defendants utterly disregarding their duty toward the plaintiff, failed to instruct the plaintiff as to how the said engine was run and failed to warn the plaintiff against the dangers of running such an engine.

VI.

That while the plaintiff was employed as aforesaid, and while this plaintiff was operating said hoisting engine as aforesaid, and in the course of his duties, on the said 23d day of September, 1907, he was ordered to stop and shut off the power of said hoisting engine and while the plaintiff was attempting to stop said engine he was obliged to place his foot on the brake of said engine, and that when attempting to so place his foot on the brake, the brake began to vibrate very violently, and

by reason of such vibration of said brake, this plaintiff, in so attempting to place his foot on said brake, was thrown against and into the gearing portion of said engine, and by means of such fall, plaintiff's right hand was caught in the gearing portion of said engine and was taken off at the wrist, and that this plaintiff suffered other physical injuries.

VII.

Plaintiff further alleges that there were no guards or any protection whatever surrounding the gearing portion of said engine, and that the said gearing portion was left exposed by reason thereof. That the defendant, Montana Coal & Coke Company, in the exercise of due care and diligence could have known, and in fact did know that there were no guards or protection whatever surrounding the gearing portion of said engine, and that the same was exposed as aforesaid, and that it was the duty of the said defendant, Montana Coal & Coke Company, in the exercise of due care and diligence on its part towards it employees, to have the gearing portion of said engine protected by means of guards or otherwise, in order that accidents of this character would be avoided, but that the said defendant, Montana Coal & Coke Company, utterly disregarding its duty in respect to having said gearing portion of said engine protected as aforesaid, left the said gearing portion fully exposed and unprotected.

VIII.

That by reason of the negligence of the defendants in ordering and compelling this plaintiff to operate said engine with full knowledge that the plaintiff was not conversant with the mechanism and handling and the operation of said hoisting engine, and knowing the dangers attend-

ant to the operation of an engine by an inexperienced man, and not having advised the plaintiff as to the dangers incident to the operation of said engine, and not having instructed the plaintiff how to operate, manage and control the said engine, and by reason of the negligence of the defendant, Montana Coal & Coke Company, in not having the gearing portion of said engine properly guarded and protected and by reason of its having left the gearing portion of said engine unguarded and unprotected, this plaintiff had his right hand taken off at the wrist, and suffered severe pain, and other physical damage, and has since, and is now, and will always remain unable to do any physical labor. That the plaintiff was of the age of twenty-nine years and capable of earning One Hundred Ten Dollars ($110.00) per month, and did earn on an average of One Hundred and Ten Dollars ($110.00) per month, but that by reason of said injuries, plaintiff's earning capacity has been permanently and almost totally disabled. That by reason of the premises, the plaintiff has been damaged in the sum of Thirty Thousand Dollars ($30,000).

The answer consisted of a general denial and special defenses of assumption of risk and contributory negligence. (Trans. p. 19.)

The plaintiff by his replication denied generally the allegations of contributory negligence and as to the defense of assumption of risk denied that he was familiar with the use of the machine causing the injury or that he had been advised as to its working. (Trans. p. 23.)

A demurrer on the part of Louis Testovarsnick was sustained and the action dismissed as to him.

This case was tried to a jury, and at the close of the testimony on behalf of the plaintiff, the defendant moved

for a non-suit upon the following grounds: (Trans. p. 147.)

"The defndant now moves the Court for a non-suit on the ground that the plaintiff has failed to establish the case, as pleaded, and has failed to establish any ground of liability on the part of the defendant in this, (1) that the evidence fails to show that the plaintiff was required to operate the engine at the time he testifies he operated it, and (2) that if it could be held that he was required to operate the engine at that time, the evidence is uncontradicted as to the point that the dangers from the operation of the engine with an exposed cog-wheel were obvious and ordinary, and were such as were assumed by the plaintiff, and that whatever statement was made to him by the foreman would not waive such assumption of responsibility."

The court denied the motion and the defendant excepted.

And at the close of the entire testimony the defendant moved the court for an instruction to the jury to return a verdict for defendant upon the following grounds: (Trans. p. 249.)

"(A) There is no evidence to show that the plaintiff was required to operate the engine in question at the time he undertook to operate it.

(B) The evidence shows that the danger from operating the engine with an exposed cog-wheel was obvious and ordinary, and such as was apparent to an ordinarily prudent person, for which reason the plaintiff assumed the risk incident to such employment.

(C) The evidence shows that the danger from operating the engine with an exposed cog-wheel was obvious and ordinary, and the plaintiff accepted the employment without protest or promise of assistance or instruction.

(D) The evidence shows that the proximate cause of the injury to plaintiff was the negligence of the

plaintiff in the manner of putting his foot upon the brake.

(E) There is no evidence to show that injury to the plaintiff was proximately caused by the failure of the defendant to instruct the plaintiff in the operation of the engine, and the dangers to be guarded against."

The foregoing motion was thereupon denied by the court.

To which ruling of the court the defendant, by its counsel, then and there excepted.

ASSIGNMENT OF ERRORS.

1. The Court erred in overruling defendant's motion for non-suit made at the close of the testimony in behalf of plaintiff, for the reasons set forth as the grounds of said motion.

2. The Court erred in overruling the defendant's motion to instruct the jury to return a verdict for the defendant made at the close of the entire testimony, for the reasons set forth as the grounds of said motion.

ARGUMENT.

The assignment of errors raises three questions, which may be thus stated:

1. Was the plaintiff required to operate the engine in question at the time he undertook to operate it?

2. Was the danger from operating the engine with an exposed cog-wheel obvious and ordinary, so as to charge the plaintiff with the assumption of the risk of operating it?

3. Was the proximate cause of the injury the failure of the defendant to instruct the plaintiff in the use of the engine, or was it the negligence of the plaintiff in the manner of attempting to put his foot on the brake.

The plaintiff was twenty-nine years of age, an Austrian by birth, but had been at work in the coal mines of the

defendant company in Montana for over ten years (Trans. p. 34), and in point of service was the senior of any of the miners who testified on the trial. He was employed as an ordinary miner to dig coal, but on the day of the accident was engaged in cleaning out and timbering an air shaft in the mine, at which place he had been working for over a week. (Trans. p. 50.) With him was working another Austrian by the name of Strugel. The place off of which the plaintiff was working was called a slant, and the small cars containing coal or waste was hauled up the slant or incline one at a time by means of a cable and a hoisting engine, operated by electricity. When the cars reached the top of the slant or incline they were thrown onto the main track and taken out by mules to the surface. The hoisting engine was a simple affair similar to that used for hoisting materials upon buildings, the cable or rope winding around the drum. The gearing consisted of two cog-wheels, one large one and one small one, and the machinery was started by pulling down on a lever, which turned on the current. It was stopped by releasing the lever, thus breaking the current, and there was a friction brake, operated by a foot treadle, which would check the motion of the drum. The engine was placed on timbers or cross pieces, and the foot treadle was down between these timbers directly in front of the operator, when standing in position to throw on or disconnect the current. The large gear or cog-wheel was about three feet in diameter and was uncovered, and was right close to the operator on his left hand side and in full view. (Testimony of Nate Drummond, a witness for plaintiff, Trans. p. 88-105.) The machinery was perfectly constructed, but the case was tried upon the theory that it was the duty of the company to have fully advised

the plaintiff of the manner of operating it. (Trans. p. 101.)

The machine was ordinarily operated by an engine man assisted by a rope rider, whose duty it was to attach the rope or cable to the cars down in the slant and ride on the cars up to the switch, and there detach them and run them on to the main track. The engineer took the cars out on the main track by mules and is generally spoken of as a driver. (Trans. pp. 115-119.) The number of men employed in the operation of hoisting depended upon the amount of coal being taken out. At times the engineer did nothing but hoist coal, and two drivers were used to haul the coal out of the main entry. At other times only one driver was used who also ran the engine, and on one of the shifts the miners did their own hoisting. On the day of the accident the rope rider was present with the car; only one driver was on duty, and at the time of the accident he had gone further in on the main entry to get out some cars. (Trans. pp. 136-137.) No one saw the accident. The plaintiff on his direct examination (Trans. pp. 35-46) testifies that on the morning of the accident the foreman told him and his partner to pull up the cars when the driver was absent. That when the driver went inside he (the plaintiff) went up to pull the car up, and started the engine. "I took hold with one hand, kind of that way (illustrating), so that I could work the hoisting engine. . . . I turned that loose when the car got up, and when the car come up, I tried to step on the brake, but the brake was moving so fast I couldn't step on it, and I missed it, and then I fell right in."

"Q. Just explain to the jury what the brake was doing.

A. The brake was shaking, flying around, and I

missed it. I didn't step on it. I missed it.

Q. You didn't get your foot on the brake?

A. No; I missed it and fell right in.

Q. Was the brake going back and forth laterally, as well as up and down?

A. Yes, sir; all ways.

Q. Why did you attempt to put your foot on the brake, Andrew?

A. I tried to stop the rope."

"Q. Could you have taken hold of anything else to stop the engine besides placing your foot upon the brake?

A. No; you can't.

* * * * * * *

Q. Was there any covering over the gearing portion of the engine?

A. No; not before.

Q. Where was the gearing portion of the engine with reference to where the brake was?

A. The brake was under the gearing.

Q. The brake was under the gearing?

A. Yes. You step with the foot on it. It is a kind of a foot brake."

"Q. When you attempted to put your foot upon the brake, you missed it?

A. Yes; and I fell into the gearing.

Q. What portion of your body went into the gearing portion of the engine?

A. The rope rider come up and pulled my hands out. My hands were right in the gearing.

Q. You say your hands. Which hand?

A. The right hand."

* * * * * * *

"Q. Where were you, Andrew, when Testovarsnick, the foreman, told you to pull up the cars, with reference to where the engine was? How far away from the engine were you?

A. I was over thirty feet.

Q. Over thirty feet?

A. Thirty feet, or something like that.

Q. Why did you go to the engine when you went to pull up the cars?

A. I fell in.

Q. No; you don't understand me. I say, why did you go to the engine when you attempted to pull the cars out of the mine?

A. I don't understand you exactly.

Q. How often did you use this engine before, for the purpose of pulling cars out of the mine? Did you ever use the engine before?

A. No.

Q. Then why did you go to the engine when your foreman told you to pull the cars out?

A. Because I am scared of getting fired or something like that. Of course I have got a family. I have to work.

Q. Did you ever operate any kind of an engine like that before?

A. No, sir.

Q. Did you ever use this engine before this particular morning?

A. No, sir.

Q. How long had you used this engine that morning when you went into the gearing portion of it?

A. I was just on the first car.

Q. The first car?

A. Yes.

Q. How long had you been using it before you got injured? How many minutes?

A. About ten or five minutes.

Q. About ten or five minutes?

A. Yes.

Q. How long had Testovarsnick been your foreman before you were injured?

A. About four or something like that, or five.

Q. Four years? About four years?

A. About four.

Q. He had been your foreman then before for about

four years?

A. Yes; I couldn't say exactly when he started. It was about four years, anyway."

"Q. What were you doing during the four years that Testovarsnick was foreman of the mine?

A. Digging coal.

Q. Digging coal?

A. Yes.

Q. What were you doing just before you were ordered to pull up these cars by means of the engine?

A. I was in the air shaft there. I was working there. I was loading coal and rock out there when it caved in there.

Q. How long before the accident happened was it that you were doing this work?

A. I was there working about a week; over a week.

Q. About a week?

A. Yes.

Q. What were you doing the day before you were injured?

A. The day before?

Q. Yes; on the 22d of September what were you doing? What were you doing on that day?

A. I was just working there in that place, loading coal and rock out.

Q. Loading coal and rock out?

A. Yes; and timbering.

Q. What were you loading coal and rock into?

A. Putting it into a car.

Q. What did you do the day before that?

A. The same.

Q. Going back now to the time when the foreman told you to take charge of the engine. Did he tell you how,—what did he tell you that morning? What did he say to you?

A. He just told me to get in and pull the cars up when his driver had no time to pull them.

Q. Did he tell you how to run the engine?

A. No.

Q. Did he say anything else to you at that time? Did he say anything else to you at that time except to tell you to pull the cars up when the driver was not there?

A. No; he didn't tell me anything besides that.

Q. He said nothing else?

A. No.

"Q. Why didn't you tell the foreman, when he told you to take charge of this engine, that you didn't know anything about how to run it?

A. Because I can't tell the foreman anything so as to get to discharge me or something like that. I just got in and worked.

Q. Did you say anything when he told you to do that?

A. I didn't say anything at all. I just went to work."

We give the witness' cross examination in full which was as follows:

"Q. How long have you been in this country, Mr. Kovec?

A. About eleven or twelve years,—something like that.

Q. Where were you born?

A. I was born in Austria.

Q. At what place?

A. Lieber.

Q. Can you read English?

A. No.

Q. Can you read the Austrian language?

A. Well, a little; yes.

Q. Where did you first work when you came to the United States?

A. I worked there in East Helena for a little while; not very long.

Q. You worked in East Helena?

A. Yes.

Q. How long did you work in East Helena?

A. About half a month.

Q. Then you went up to Aldrich?

A. Yes. Then I went up to Aldrich.

Q. What did you do when you first went up to Aldrich?

A. I was digging coal there.

Q. Had you ever dug any coal before?

A. No.

Q. When did you first get acquainted with Louis Testovarsnick? When did you first know him?

A. I knew him up there.

Q. Where?

A. At Aldrich.

Q. He was there when you first went there?

A. What do you say?

Q. Was he there when you first went to Aldrich?

A. I guess I was there before he was.

Q. You were there before he was?

A. Yes.

Q. You didn't know him in the old country?

A. No.

Q. Did you know Frank Strugel in the old country?

A. No.

Q. When did you first know him?

A. In Aldrich.

Q. How long has he been working there?

A. I can't say how long he has been working there, but it is a long time.

Q. He has been there pretty nearly as long as you have?

A. Well, pretty close.

Q. This coal that you dig out,—what do you do with that? Do you put it in a car?

A. Yes.

Q. Then what becomes of the car? What do you do with the car after you get it loaded with the coal?

A. Just leave it in the switch.

Q. Who takes it out of the mine?

A. The driver. The driver takes it out.

Q. Who was the driver at this time when you were

hurt? Who was the driver then?

A. At that time the driver was Billy England.

Q. Were you mining coal that day you were injured?

A. I was timbering that day when I got hurt.

Q. You were putting in a set of timbers?

A. I was putting in a set of timbers, and fixing it up.

Q. You were really cleaning out an air shaft, were you not?

A. What do you say?

Q. You were cleaning out an air shaft, were you not?

A. Yes; cleaning it and fixing it up.

Q. You were not mining coal that day at all?

A. Not mining coal?

Q. Yes; you were not mining coal that day?

A. I was loading coal in the car from this place.

Q. This stuff that you were putting in the car was waste from the air shaft, was it not?

A. Well, sometimes we put coal in, too.

Q. That is, in your work there in the air shaft, when you found any coal, you put it in?

A. Yes.

Q. But most of the stuff you took out that day was trash out of that shaft, was it not?

A. Yes.

Q. Had you been working in that particular place before that day?

A. I had worked in there before, of course.

Q. How long before.

A. Over a week.

Q. Over a week?

A. Yes; something like that.

Q. Had you been mining in that part of the mine before? Had you been working in that part of the mine before this week?

A. One day before, I think. I don't know.

Q. How did you get in to where you work? How do you get into the mine?

A. I walked in.

Q. You walked in?

A. Yes.

Q. Do you walk by where this engine is?

A. I went in and went to the main entry, and go right in where the air goes.

Q. Had you ever seen this engine before the day you went up there to try to work it?

A. No; I hadn't seen it.

Q. You never had seen it before?

A. No.

Q. You had walked by there, in going to your work in the mine, for a whole week, and didn't see the engine?

A. I seen the engine, but I didn't see it worked.

Q. I didn't ask you that. I asked you if you had ever seen the engine before that day you tried to work it? Had you ever seen the engine before that day?

A. I seen it when I went in.

Q. You saw it as you went by it on your way to your work during this week?

A. Yes.

Q. During this time that you worked in this place, during this week before you got hurt, was the engine running every day?

A. I don't know whether it was running or not.

Q. How did you get the coal out of it wasn't running?

A. I don't know. I just put the cars on the switch.

Q. That is all you had to do with it. You don't know what became of the cars after that? You don't know what became of the cars after you put them on the switch?

A. No.

Q. How far away from where the engine was, was this switch? How far away was this switch from where the engine was?

A. About over thirty feet.

Q. About thirty feet?

A. Over thirty feet.

Q. You had to go by the engine, or you had to walk by the engine in order to get in where you went to work?

A. I went by the engine, and then went around back to the place where I worked.

Q. Did you see anybody working the engine before you undertook to work it that day?

A. I didn't see it that day.

Q. I say before that day. During the week you were working there mining coal, did you see anyone working the engine?

A. Well, England was pulling it up.

Q. When you worked in the other part of the mine, did you ever see any other engines used for hauling up these cars of coal?

A. Well, sure, I seen the engines, but there was somebody running them. I never run any of them.

Q. You never ran any of them?

A. No.

Q. Didn't you run an engine over in what they call No. 4?

A. No.

Q. You never ran an engine at all of any kind?

A. No.

Q. During all the time you were there, you never ran an engine?

A. No.

Q. And never saw one run?

A. No.

Q. Never was around where it was running at all?

A. Not close.

Q. Never any closer to it than this distance of thirty feet, which you say is the distance between the switch and the engine when it is running?

A. No.

Q. How does the engine work? How does it work in pulling up the cars?

A. I don't know exactly how it is worked.

Q. What does it look like? Has it got any wheels or ropes, or anything?

A. Well, it has got wheels and ropes.

Q. Just tell the jury how it looks.

A. I would have to have the interpreter in order to understand it better.

Q. Well, never mind. We will get along without the interpreter, I think. What time in the day was it when you were hurt?

A. About ten o'clock I got hurt.

Q. What time did you go on shift?

A. Seven o'clock in the morning I went on shift.

Q. Who went with you?

A. Frank Strugel.

Q. Was he your partner?

A. Yes.

Q. Was there anybody else working in this slant with you?

A. Not with me.

Q. Was there anyone else in the slant but you and your partner, Strugel?

A. There was someone else in there, but I didn't know who it was,—in that part.

Q. From that time, from seven until ten, was there anyone else there but you and Strugel?

A. No.

Q. Was there anyone else in the mine at all?

A. Yes; in the mine there was.

Q. Whereabouts in the mine were they working?

A. Down below, and back there, when we come in.

Q. What were they doing?

A. They were digging coal, and all that kind of business.

Q. When did Louis tell you that you had to pull the cars up if the driver was not there?

A. He told me that morning.

Q. He told you that morning?

A. Yes, sir.

Q. What time in the morning?

A. Before seven o'clock.

Q. Before you went to work?

A. Yes, sir.

Q. Where was Louis at that time when he told you this?

A. Down by the tool box.

Q. Was Frank Strugel with you when he told you?

A. Yes; he was with me.

Q. Did he tell you to pull them up, or did he tell Strugel to pull them up?

A. He just told us to get in and pull it up.

Q. You didn't say anything to him.

A. No; I didn't say anything to him.

Q. Did Strugel say anything?

A. No.

Q. Could Strugel run the engine?

A. No.

Q. You didn't tell him you could not run the engine?

A. No. I didn't ask him.

Q. You didn't ask him how to run the engine?

A. No.

Q. Or where the engine was?

A. No.

Q. Did you know where it was?

A. Yes.

Q. How did you know that?

A. I knew where the engine was, because I had worked in the back entry there.

Q. You had seen the engine before?

A. Of course, I had seen it.

Q. Did you know how to hook the cars on, so as to pull them up?

A. Sure I knew that.

Q. You had done that often?

A. I put the car on the switch and put the pin on.

Q. You had often done that, had you not? You did that every day? You did that every day, didn't you?

A. Yes; just the car.

Q. How did you get the first car out that morning?

A. That was the first car when I fell in.

Q. That was the first car?

A. Yes, sir.

Q. You were working from seven to ten in getting that one car full?

A. Yes; we were timbering.

Q. You timbered a while?

A. Yes.

Q. Who pushed the car out of the slant?

A. I pushed the car out from the back entry, and my "buddy."

(In using the word "buddy," the witness evidently meant partner.)

Q. Who put it onto the rope? Who hooked the car on to the rope?

A. Jerry Milautz, I guess.

Q. Who was he?

A. He was there.

Q. What was he doing?

A. He was riding the rope.

Q. How do you mean?

A. He just hooked the rope on to the car.

Q. He is the fellow who hooks the car on to the rope?

A. Yes.

Q. Was this rope that you hooked the car on to,—was the other end of that attached to the engine?

A. Yes.

Q. What kind of a rope was it, wire or cotton?

A. Wire.

Q. Who went with you up to where the engine was?

A. I went up.

Q. By yourself?

A. Yes.

Q. Where was Jerry Milautz then?

A. He was right there.

Q. He was standing right near?

A. Yes; down below.

Q. Did you ask him anything about running the engine?

A. No.

Q. Or Strugel, either?

Q. You just went up and started the engine?

A. Yes.

Q. How did you start the engine?

A. I just went up to see anyone get in and see them run that engine, but nobody was there. I never run it before.

Q. When you got up there, you didn't find anyone at the engine?

A. No.

Q. How did you get the engine started?

A. I had seen somebody run it before.

Q. You had seen somebody start it before?

A. Yes.

Q. Whom did you see running it before?

A. I seen Billy England run it before.

Q. It was his business to run it, was it not? That is what he was there for?

A. Of course; but he was not there at that time.

Q. He was not there when you went up to the engine?

A. No.

Q. Had you seen him that morning?

A. No.

Q. Don't you know that he had been hauling coal up all the morning?

A. No.

Q. And had simply gone into the entry with his loaded cars to haul them out of the entry, when you started to run the engine?

A. He had gone inside some place.

Q. What was he doing inside?

A. He had gone to pull some cars inside.

Q. He had gone to pull some cars inside.

A. Yes.

Q. Tell the jury how you started the engine. It was not running when you got up there, was it?

A. No.

Q. How did you start it?

A. I had seen it. I had seen him hold that—I don't know what you call it,—down, like this. (Illustrating.)

Q. The lever?

A. Yes. I seen him hold th lever down. That is all I seen.

Q. Whom had you seen do that?

A. I don't know. He is not here,—that fellow.

Q. Did you ever see Billy England do it that way?

A. I seen him before once, but not that day.

Q. How did you know how to start the engine?

A. I didn't know how to start it. I just seen him do that before.

Q. You didn't know what would happen when you pulled any of those levers?

A. No; only I saw it going up and down.

Q. When you pulled this thing with your left hand, what happened?

A. That turned the engine.

Q. That turned the engine? Which way did the engine turn? Did it turn toward you or the other way?

A. Any place.

Q. Any place? Now when you pulled this lever down, or turned this lever down, did it pull the car?

A. Yes.

Q. Then when you let go of it, what happened?

A. Well, that handle has to be turned.

Q. The handle has to be turned?

A. The clutch.

Q. You have to turn the clutch, too, do you?

A. Yes.

Q. Did you do that?

A. I turned the clutch.

Q. Then what happened?

A. Then it ran.

Q. The engine ran then?

A. Yes.

Q. Did it draw the car up?

A. Yes.

Q. Did you know it would draw the car up when you turned it on that way? What did you do that for?

A. So as to pull the car up.

Q. How did you know that would pull the cars up?

A. I had seen the other fellows do it.

Q. What did you do when the car got up to where you wanted it to go?

A. I tried to stop it.

Q. How did you try to stop it?

A. I tried to stop it with the brake.

Q. Did you still hold on to the clutch?

A. I left that, and tried to step on the brake. The brake was shaky, and I missed it.

Q. It was light there, was it not? There was a light there, was there not?

A. Yes.

Q. You could see the machine?

A. Yes.

Q. You could see this brake shaking?

A. I could see it when I tried to step on it.

Q. You could see it?

A. I could see it, but I missed it.

Q. You missed it? But I say, you saw it there, did you? When you started to step, couldn't you see the brake?

A. Well, the rope was pretty close to me.

Q. Did you see this cog-wheel going around?

A. I seen it, but not when I started to step on the brake.

Q. But when the machine was running, couldn't you see the cog-wheel running around?

A. Yes.

Q. Do you know what makes it go around? Do you know what made it go around?

A. The electric made it go around.

Q. Do you know how the electric got into the machine? Didn't it get in there by some of those things you pulled?

A. I don't know that.

Q. Why did you pull them for, then? Why did you pull these levers if you didn't know what was going to happen?

Q. Why did you pull the levers in the first place?

A. When the cars were going up—

Q. (Interrupting.) You pulled them to start the engine, didn't you?

A. Yes, sir.

Q. That is what you wanted to do? You wanted to start the engine?

A. Yes.

Q. When you wanted to stop the engine, did you let go of the levers?

A. Yes.

Q. You let go of them?

A. Yes.

Q. Did anything stop at all?

A. I went to step on the brake to stop it.

Q. Did you ever see anyone try to step on the brake before?

A. No.

Q. How did you know it was a brake?

A. I could see the brake there around the wheel.

Q. You could see that that was a brake there for the purpose of stopping that wheel?

A. Yes.

Q. This cog-wheel,—how far away was that, can you tell,—the cog-wheel that you fell into?

A. That was pretty close. Not very far.

Q. It was right near? It didn't have any top on it, did it?

A. No; the brake was down here (indicating), and the wheel was up here (indicating).

Q. Up alongside of the brake?

A. Yes.

Q. It didn't have any top on it, did it?

A. No.

Q. It was revolving? It was turning around?

A. Yes.

Q. Going fast?

A. Going fast.

Q. Was it turning from you, or coming to you. Which way was it turning? Was it turning to you?

A. It was coming to me.

Q. Now, this brake.—did you have to put your foot up or down to get your foot on to it?

A. It is not very high. It is something like that. (Illustrating height of brake.)

Q. Just stand up and show the jury how you did that. Catch hold of the levers you had hold of.

A. It was just about like this. I stood here on this side of it. There is a brake on the side, like this, and I just tried to step on it quick, so that the rope would not lick me,—the rope that pulls the car out,—*I tried to step on it, and I missed it. I didn't step on it.*

Q. So you didn't step on the brake at all, but missed it?

A. I missed it and fell right in the wheel.

Q. Fell right in the wheel? If you had stepped on the brake as you started to, you would not have fallen, would you?

A. I don't know whether I would fall or not. I don't think I would. But if there was anything over those wheels, I couldn't put my hands in.

Q. None of those things that you caught hold of threw you into the wheel, did they?

A. Well, the brake threw me in.

Q. But you missed the brake entirely?

A. Yes.

Q. And you fell because you missed the brake?

A. Yes.

Q. Where was Jerry Milautz when this happened?

A. He was with the car.

Q. How far away was the car from you?

A. Not very far. About ten feet, or something like

that.

Q. Was he on the car, or just standing alongside of it?

A. He was going along side of the car, running. He tried to put the brake on, so it would stop.

Q. As the car came along up, he came with the car, did he?

A. Yes.

Q. Where was Strugel?

A. He was down at the place fixing something. I don't know what he was doing.

Q. He didn't come up with the car at all, did he?

A. Not at that time.

Q. He didn't come up until after you got hurt?

A. He came up when I got hurt.

Q. Where was Louis at this time?

A. He was inside some place at that time.

Q. He wasn't anywhere around there, at all, was he?

A. No.

Q. He was somewhere else in the mine?

A. Yes.

Q. Did he come there when you got hurt?

A. When I got hurt he come around.

Q. Jerry Milautz and Strugel came up, did they?

A. Yes.

Q. Did you tell Jerry how it happened?

A. I hollered to him. I said, "Hold me; I am on the wheels."

Q. Who stopped the machine?

A. My hand stopped the machine.

Q. Your hand stopped the machine?

A. Yes.

Q. It stopped as soon as you fell into it?

A. Yes.

Q. Who helped you out of it?

A. Jerry Milautz and Strugel.

Q. Was Louis there then?

A. Louis come up after that.

Q. Where did they take you? Did they take you out of the mine?

A. Yes; they took me out of the mine. They put me on a car, and took me out.

Q. Did you ask Jerry Milautz to go up and pull the car up?

A. No.

Q. You had seen him there working with the cars right along, had you not?

A. Yes; I seen him. He was the rope rider.

Q. That was his business? It was his business to get those cars up, was it not?

A. Whose?

Q. Jerry's?

A. No; he was just a rope rider.

Q. Well, it was his business to hook the cars on and get them up?

A. Yes; that was his business.

Q. That was his business?

A. Yes.

Q. It was not your business?

A. No.

Q. Your business was to fill the cars?

A. Yes.

Q. How long before had you seen England that morning?

A. I don't remember whether I seen him that morning or not.

Q. Had you seen anybody else pulling any cars up that morning?

A. No; I didn't see it.

Q. How far inside of this slant—you call that a slant, don't you, where you were working? You call that a slant where you were working at that time?

A. Yes; we call that a slant. It goes back in. I was working in an entry. This place had been worked thirty feet.

Q. What do you call this place where you haul the

cars up? Do you call that a slant?

A. Yes; that is what I call a slant. That was an entry where I was working. It was an air course.

Q. And it was a slant where they were pulling the coal up?

A. Yes.

Q. When they got the cars up to the engine, they hooked the cars all together, and hauled them out with a mule, didn't they?

A. Yes.

Q. That is what England did? He pulled the cars up, and hooked them together, and moved them out, didn't he? That is what Billy England was doing?

A. He was driving; yes.

It appeared in the testimony of one of the defendant's witnesses that the plaintiff had operated this engine in No. 1 slant (Trans. p. 240) and the plaintiff was called in rebuttal, and testified (Trans. pp. 247-248) that he worked in the No. 1 slant for about a year with one Tony Vassar as his partner; that on the 11 o'clock shift the coal was hoisted by his partner and that he (the plaintiff) never operated the engine but always rode upon the car. Frank Strugel testified that he was with the plaintiff when the foreman told him that if the driver was not there "they had to pull the cars up themselves." (Trans. p. 69.) That he, Strugel, didn't say anything to the foreman, but that the plaintiff said, "We will do it if we can," and that the foreman said, "Try it if you can." (Trans. p. 72.)

Jerry Milantz, the rope rider, testified to what he saw of the injury. He also testified that he had been running the engine that morning and frequently ran it when he had anybody to ride the car. (Trans. p. 86.)

Nate Drummond, a witness for plaintiff, who was called

as a machinist who had set up and worked this engine, testified as follows, among other things (Trans. p. 111):

"Q. How far would the man be from this revolving uncovered cog-wheel when he was standing there prepared to throw the machine in or out of gear?

A. Standing there in the proper place, he would be within about a foot and a half, I should judge.

Q. Standing above, or on the same level?

A. About on the same level.

Q. About how far is the uncovered cog-wheel from the treadle of the brake?

A. About the same distance; about a foot, or a foot and a half?

Q. About a foot?

A. About a foot, or a little over.

Q. Is it to the left or to the right of the brake?

A. To the left.

Q. Standing there with his left hand on the controller lever?

A. Yes, sir.

Q. And putting his foot on the brake treadle, the exposed cog-wheel would be revolving about a foot away from him, upon the left side?

A. Yes, sir; or a foot and a half; such a matter.

Q. Could a man standing there see this revolving cog-wheel if the light was burning in its usual condition?

A. I should think so; yes, sir.

Q. Now, the operation which you have described was the ordinary operation of that machine, as it was there placed, was it not?

A. Yes, sir.

Q. That is the way it was operated every time it was operated by anybody?

A. Yes, sir."

We have called the court's attention to the above extracts of the testimony because we believe that they show clearly that the plaintiff was an experienced miner, of

ten years' work in this mine where this engine was in daily use; that in spite of his denial of facts and knowledge, it is clear from his own testimony that he knew as much about the operation of this engine as any one about the mine, and that if he had never actually operated it before the accident, he was the only man around the mine of whom that could be said. These facts will be emphasized by a reading of all of the evidence introduced on behalf of the plaintiff. From them the deductions are inevitable and necessary.

The plaintiff was a volunteer in the operation of this engine. He was told, according to his testimony, that he would have to hoist the cars when the driver was not around. But there was a driver within easy call. The rope rider in charge of the car, who knew how to operate the engine, was at his post, but no request was made of him to operate it. When the foreman told the plaintiff that he would have to hoist the cars, the plaintiff made no protest and gave no indication of an ignorance and lack of experience such as would call for active instructions. He had worked in the mines longer than the foreman had, and made no suggestion to the foreman that he was unable or unwilling to operate the engine. It was of simple construction, easily operated by everybody else, even those without any experience at all, and it was a machine of common use. We respectfully submit that there was no evidence to justify the submission to the jury of the question as to whether the plaintiff was required to operate the engine.

Again, it is apparent from all of the testimony that the danger of injury from falling into the exposed gearing of this machine, as well also from undertaking to operate it uninstructed, was obvious and ordinary and

plainly apparent and appreciated by a person of ordinary intelligence. *Judge Sanborn in St. Louis Cordage Co. vs. Miller,* 126 *Fed.* 495, 63 *L. R. A.* 551, thus lays down the rules supported, as he says by the great weight of authority in the United States, as well as by the opinions of the Supreme Court:

"A servant by entering or continuing in the employment of the master without complaint assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation.

"A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment, assumes those risks and dangers to the same extent that he undertakes those existing when he enters upon the employment.

"Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care 'to furnish the servant with a reasonably safe place and reasonably safe appliances and tools to use.''

"Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain or remote and improbable."

"The court below fell into an error when it instructed the jury that although the plaintiff continued in the employment of the defendant by the side of the visible unguarded gearing with full knowledge that the cogs which injured her were uncovered, still she could not be held to have assumed the risk of working by their side unless the danger from them was so imminent that per-

sons of ordinary prudence would have declined to incur it under similar circumstances. *Choctaw O. & G. R. Co. vs. McDade*, 191 *U. S.* 64; 48 *L. Ed.* 96."

After further discussion of the proposition that the question before the court at the close of the testimony is not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict for the plaintiff, the court says:

"The machinery, the cogs, the slippery lever and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain in the danger impending from them. It was plain and certain that if the employee permitted her hand to slip between the revolving cogs that hand would be injured. The defect of the unguarded cogs was obvious, the danger from it was apparent, and, without a disregard of the rules to which we have adverted and the decisions of the Supreme Court and of the other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and known defect and of a plain and apparent danger, assumed the risk of the injury of which she complained, so that she never had any cause of action against the defendant."

But it is contended as the chief element in the cause of action that defendant should have instructed the plaintiff as to the operation of the engine. The plaintiff's testimony shows that he knew how to operate the engine. His experience and employment were such as to entitle the defendant to believe him qualified to run the engine. He made no objection or protest when directed to run the engine, and said nothing to indicate that he was

inexperienced or ignorant. The Supreme Court of Montana, in *Forquer vs. Slater Brick Co.* 97 *Pac.* 843, thus deals with this question, adversely to plaintiff's contention:

"3. Was the defendant guilty of negligence in failing to explain to plaintiff the dangers to be apprehended from the machinery? The first question involved is one of pleading. It is alleged in the complaint that plaintiff was 13 years of age, wholly unskilled in the use of machinery, and that defendant was negligent in not explaining to plaintiff the dangers to be apprehended. There is no allegation that plaintiff was not as intelligent as the average boy of his age, and we must conclude, therefore, in the light of his testimony, that he was. There is no allegation that plaintiff was inexperienced in the use of such machinery, but, without objection, he testified that he was. No complaint is made of a failure to warn the plaintiff, unless that omission be involved in the failure to explain the dangers to him. We dwell upon this question of pleading, not because the appellant urges the same as fatal to a recovery, but because it is necessarily involved in the disposition we make of the appeal. After carefully reading the testimony, we are convinced that it cannot be claimed that parts of the machine in question were not obviously dangerous, or that plaintiff did not know and understand wherein the danger lay. That is to say, it was apparent that, if a person's hand came in contact with the cogs of the knives while the machine was in motion, injury would probably result. Plaintiff knew this. It was obvious. It was unnecessary to tell this to the boy or explain it to him. He knew all about it. Therefore it was unnecessary and would have been useless to give him any information on that subject, and no negligence can be predicated upon defendant's failure to do so," citing numerous authorities.

This brings us then to the proximate cause of the accident, which according to plaintiff's testimony was

not the lack of instruction as to how to operate the machine, but the fact that he failed to put his foot on the brake. No amount of instruction could have avoided the injury after the plaintiff had failed to put his foot squarely on the brake treadle. The plaintiff saw the brake, and saw its oscillations and vibrations. He knew the part it played in the operation of the engine. He knew also the necessity of putting his foot on it, and the danger of injury from falling into the machine was obvious. These were the things of which the employer could have warned him. And yet with a full knowledge of all these he threw his weight upon his foot without being sure that it was on the brake, and missing it fell into the machine. It was the risk of this danger which the plaintiff assumed when he undertook without objection, and upon his own volition, to operate the engine.

We therefore submit that the Court erred in refusing to withdraw the case from the jury, for the reason that there is no substantial evidence in the case upon which the jury could base a verdict for the plaintiff.

Respectfully submitted,

CARPENTER, DAY & CARPENTER,

Attorneys for Plaintiff in Error.

NO. 1705.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE MONTANA COAL & COKE COMPANY,
(a Corporation),
Plaintiff in Error,

vs.

ANDREW KOVEC,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

MILLER & O'CONNOR and
WALSH & NOLAN,
Attorneys for Defendants in Error.

FILED
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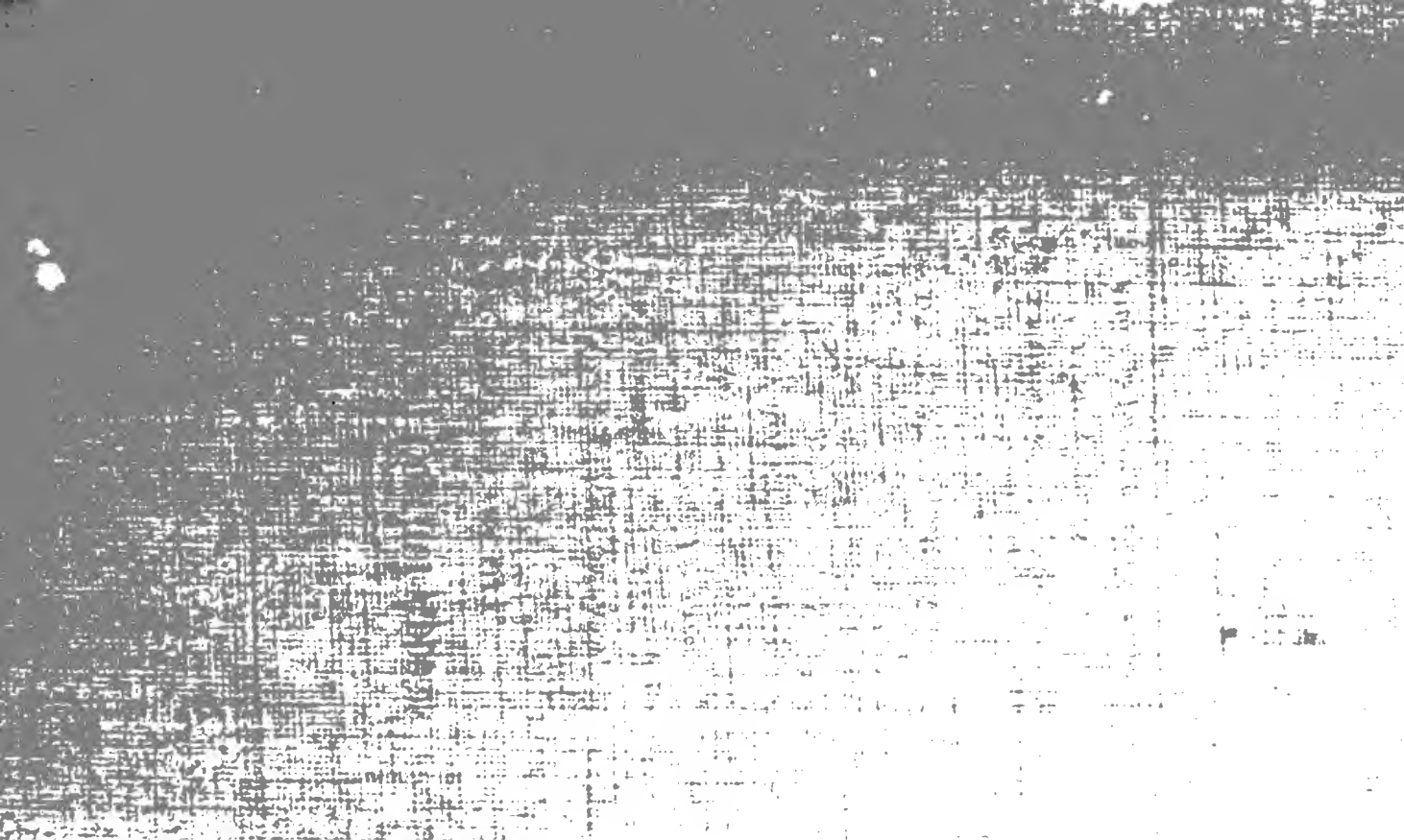

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BRIEF OF DEFENDANT IN ERROR.

There is but one question presented by this appeal, and that is whether, on the evidence, the case should have been submitted to the jury, and in the brief of plaintiff in error the question is viewed and discussed in a three-fold aspect.

First, it is contended that in the operation of the engine the defendant in error was a volunteer. Second, that the facts disclose an assumption of risk, and third, that the contributing negligence of the defendant in error is responsible for the injury.

Before discussing the law, which, on the undisputed facts, as we contend, disposes of the controversy adversely to plaintiff in error, we believe a fuller statement of the facts might be indulged in.

The defendant in error at the time of the injury was

twenty-nine years old and had been in the employ of the Montana Coal and Coke Company for a number of years as a coal digger. These coal mining operations were carried on underneath the ground and in these operations he had nothing whatever to do with machinery of any character.

Transcript, page 34.

In the mine where he worked, for the hauling of cars electric engines were used, and the electric engine which defendant in error tried to operate at the time he was injured was in one of the subterranean passage-ways of the mine at a depth of nearly a mile from the surface.

Transcript, page 90.

The engine was at and near what was called the main entry and at the top of a slant and was used to haul cars out of the slant to the main track.

Transcript, page 90.

The top of the slant or the knuckle as it was called was about thirty feet distant from the engine, and for the purpose of furnishing light there was an electric bulb at the machine over the head of the operator, and thirty feet distant another electric light was installed so that the operator could see when the cars came over the knuckle. This latter light, however, was in no way helpful in connection with the operation of the machine.

Transcript, pages 121-122.

The engine itself, referred to in the brief of plaintiff in error as a simple affair, was we submit complex in mechanism and operation.

In order to operate it successfully and escape injury the services of all the organs of the body were required simultaneously.

William England, speaking of its mechanism, testified as follows:

> "Q. So that really, then, when you were operating the engine there, to what matters did you have to give attention?
>
> "A. Well, you fixed the engine first and then you had to give attention to the cars when they were coming up.
>
> "Q. Did you have to use your hands at all?
>
> "A. Yes, sir, you had to use one on the clutch and one on the lever.
>
> "Q. Did you have to use your feet?
>
> "A. Yes, sir, one foot for the brake.
>
> "Q. Did you have to use your eyes?
>
> "A. Yes, sir.
>
> "Q. What would you be using your eyes upon?
>
> "A. Watching the cars."

Transcript, page 125.

This electric bulb to which reference has already been made as furnishing light, sometimes furnished a reduced light when the electric supply was subjected to a heavy burden for motive purposes,

Transcript, page 124,

and as the cars were brought to the knuckle and over it and when the rope which was fastened to the cars and which revolved around the drum of the engine was disconnected, extreme watchfulness on the part of the engine operator was called for, otherwise there was a likelihood that the rope swinging, and having on its end a metallic

arrangement, might strike the operator and inflict a grievous, if not, a fatal injury upon him.

Testimony of Drummond, pages 102-103,

and of England, pages 124-125.

The brake was underneath and was operated by pressing the foot upon it,

Transcript, page 125,

and was no wider than the sole of a man's shoe,

Transcript, page 126,

and when the engine was in operation this brake was constantly shaking.

Transcript, page 126.

The gearing, containing cog wheels, was on the left hand side of the operator, and about one or two feet away from him without any shield or covering.

Transcript, page 127.

This gearing so exposed, with the danger of missing the brake, was considered not safe.

Transcript, pages 127 and 104.

Mr. Drummond, testifying about this exposed gearing, said:

> "Q. At the time you installed the machine there, do you know whether or not there was any guard or shield over these cog wheels?
>
> "A. No, sir, there was no shield or guard there.
>
> "Q. What have you to say as to whether or not, if a person conducting operations there should slip in any way there would be any likelihood that he could get into that cog wheel business?
>
> "A. Yes, sir.
>
> "Q. Now, having in mind the machinery as it was there, and what might likely happen in connection

with the operation of that machinery, would you say that those cog-wheels that were exposed were reasonably safe in the case of even an experienced man in that department?

"A. No, sir.

"Q. And how would it be in the case of an inexperienced man who did not understand how to operate, would you say that these cog wheels were reasonably safe there for such a person?

"A. I think it would be all the worse for him.

Transcript, page 104.

And as to the machine itself, the evidence is:

"Q. Do you think that it requires any experience to operate one of these engines?

"A. You have got to be shown how to run it all right."

Transcript page 119.

This was the machine that the defendant in error was directed to operate at the time he was injured. It is true he saw the machine at different times and undoubtedly this fact was known to the plaintiff in error. He saw it, not in open daylight, but beneath the surface of the ground, and with a light at best unfitted to make possible a full inspection. This exposed gearing, it is true was before him, but it became dangerous only in the event of his stumbling, and the occasion of his stumbling or the possibility of his stumbling could only arise by missing the treadle or brake. The plaintiff in error knew that this brake had a tremulous motion when the machine was at work. With this tremulous motion there was a constant danger of missing the brake and without it there was scarcely any danger that this would occur and the failure of the defendant in error in this particular alone to advise

this inexperienced servant called away from his regular employment, of this lurking danger would be sufficient to fasten responsibility upon it.

Having in mind the facts as here stated, we will now invite the attention of the court to the principles of law which have application, and as to which, as we contend, there is no diversity of view.

> "It is also insisted for the appellant that the injury which the plaintiff sustained was incident to his employment, and that he assumed the risk. The mere fact that the respondent was aware that the cage was shaking, and not running smoothly, is not sufficient to justify us in holding that he has assumed the risk, and there is no evidence to show that the defects were of such an obviously dangerous character that he ought to have appreciated the risk and ceased his employment, or that a man of reasonable precaution, placed under similar circumstances would have done so. It is shown that the plaintiff was not skilled in mechanic arts, had never worked in a machine-shop, and never had anything to do with machinery, except in this mine. Therefore, he had the right to rely, at least to a reasonable extent, on the judgment of his employer, who is presumed to have a knowledge of the machinery used in his business, and to assume that he would discharge his duty by furnishing reasonably safe machinery, and keeping it in proper condition and repair. Where an employe has knowledge of defects in machinery used in his employment, and the defects are not so dangerous as to threaten immediate injury, or the danger is not such as to be reasonably apprehended by him, his continuance in the service will not defeat a recovery for injuries resulting from such defects. If, however, the defects are so obviously and immediately dangerous that a person of ordinary prudence and precaution would refuse to use the machinery, then, if the servant continues its use, he assumes the risk. We think it was a question for the jury to determine whether, under all the circumstances in evidence in this case,

the employe by continuing in his employment with knowledge of the defects, assumed the risk of the injury which he sustained. 'Mere knowledge of the defects is not sufficient, unless it does or should carry to a servant's mind the danger from which he suffered. A servant may assume that the master will do his duty; and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he ordinarily will be justified in obeying orders, subject to the qualification that he must not rashly or deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. It is one thing to be aware of defects, and another to know and appreciate the risks resulting therefrom.' Thomas on Negligence, 851."

Tuckett v. American Steam etc. Laundry, 116 Am. St. Rep. 842-843.

"The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care should know, the risk to which he is exposed, he will as a rule be held to have assumed them; but where he either does not know, or knowing, does not appreciate, such risks, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk. 26 Cyc. 1196; Roth v. N. P. L. Co., 18 Or. 205, 22 Pac. 842; Carlson v. Oregon Short Line Ry. Co., 21 Or. 450, 28 Pac. 497; Wagner v. Portland, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; Geldard v. Marshall, 43 Or. 438, 73 Pac. 330. Larsen entered the employment of the defendant as an ordinary laborer to dig and shovel dirt in the bottom of a trench. He did not thereby impliedly represent to the defendant that he had any knowledge or skill in digging a tunnel or constructing a sewer. The evidence shows that he was a cement worker, and had little skill in handling a pick and shovel, or, as stated by one witness, 'he handled a shovel like a green hand.' When told by the master to begin digging into the bank for a tunnel, he must have seen that it was 25 feet high, and that no pro-

tection against its falling or caving had been made by his employer. But there is a difference between knowledge of the surrounding circumstances and appreciation of a risk. Roth v. Northern Pacific Lumbering Co., supra. In that case it is said that 'one may know the facts, and yet not understand the risk'; or, as Mr. Justice Byles observed: 'A servant knowing the facts may be utterly ignorant of the risks.' Clark v. Holmes, 7 Hurl. & N. 937. For, after all, Mr. Justice Hallet said: 'It is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed.'"

Millen v. Pacific Bridge Co., 95 Pac. 198.

"The appellee, at the time of his injury, was not engaged in performing ordinary labor, but was at that time under the direction of his foreman, engaged in a most hazardous and perilous undertaking, which rendered the appellant liable for his injury: Graver Tank Works v. O'Donnell, 191 Ill. 236, 60 N. E. 831; Springfield Boiler, etc. Mfg. Co. v. Parks, 222 Ill. 355, 78 N. E. 809. * * * In Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651, it was said: 'The rule is, that where the servant is injured while obeying the orders of his master to perfrom work in a dangerous manner the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it.' The question whether the execution of the order of the foreman was attached with such danger that a man of ordinary prudence (even though he knew of the danger which he encountered) would not have incurred such danger by going upon the plank and attemptnig to raise said block and fall with his hands was a question for the jury, and not one to be determined by the court as a question of law."

Kennedy v. Swift & Co., 123 Am. St. Rep. 115-116.

"In this case, however, if the theory of the plaintiff was sustained by the evidence, the employe was suddenly called to a place of danger by the order of his superior. In such a situation the master is presumed to know whether the place or instrumentality is reasonably safe, and the servant may rely upon that assumption, unless the danger is so obvious that a prudent man in the same circumstances would not encounter it, even with the assurance that such presumption affords. The servant, acting in good faith, upon an order of his superior, may rely upon the instrumentalities being in their usual condition and fit for use, where he does not have knowledge, and is not chargeable with notice to the contrary. In such a situation he may rightly rely upon the assumption that his employer has done his duty by furnishing reasonably safe machinery, appliances, and surroundings. Thompson on Negligence, Sec. 3765; Mo. Pac. Ry. Co. v. Barber, 44 Kan. 612, 24 Pac. 969. The order is considered to be an implied assurance that there is no abnormal danger. Labatt, Master & Servant, Sec. 440c. Whether the plaintiff was negligent in the performance of the duty assigned to him must be determined in the light of the situation in which he is placed. If his act was such as a reasonably prudent man would have done, it was not negligent, although some other course would have been absolutely safe. Brinkmeier v. Railway Co., 69 Kan. 738, 77 Pac. 586. It must be remembered that this was a sudden call to a dangerous service which had to be performed then, or not at all. He was bound to use the discretion and judgment that a prudent man would in that situation. If it was a palpably reckless or foolhardy risk, he cannot be excused. If it was such as a prudent man would have performed, he might undertake it, although hazardous. The same rule applies to the manner in which the service was performed. Called to the service, he was bound to use such means as reasonable prudence dictated in the emergency in which he was placed. Whether he ought to have undertaken the work, and whether he made use of reasonable means in performing it, were questions properly submitted to the jury."

St. Louis & S. F. R. Co. v. Morri, 93 Pac. 156.

"In hiring out as a carpenter plaintiff impliedly represented himself as competent to perform the duties devolving upon workmen peculiar to that trade, and the employer might proceed on that theory, but from his undertaking to do carpenter work the company did not have the right necessarily to infer that he was familiar with the dangers in operating a buzzsaw. As said, plaintiff was without experience in the operation of machinery, and the jury might have found that he did not indicate anything to the contrary. He was not warned of the danger, and in the circumstances disclosed whether defendant was negligent in failing so to do, and whether he assumed the risk and was guilty of contributory negligence, were issues appropriate for the decision of the jury. * * * The decisions establishing the principle are too numerous for citation. It is well expressed in Labatt on Master & Servant, Sec. 241: 'On the other hand, the master may properly be found guilty of negligence whenever instruction was not given under circumstances which were of such a nature that he was not justified in acting on the assumption that the servant appreciated the risk involved, and that, on the other hand, culpability cannot be predicated of the omission to give instruction if the master had good grounds for supposing that the servant understood the risk. Before an employer can be held liable for a failure to warn, there must be something to suggest to him that a warning is necessary. Unless this necessity was, or ought to have been, known to him, he is considered to be justified in acting upon the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself.' The only difficulty is in the application, and all held that the issue was for the jury."

Harney v. Chicago, R. I. & P. Ry. Co., 115 N. W. 887.

"Upon this point the circuit judge properly charged the jury that it was the duty of the defendant foreman, before setting him to work in operating the jointer, to explain to him its mode of successful opera-

tion, its dangers to the unskilled, and the care and attention demanded from its operator, and that the degree of instruction to be given to the servant depends upon the age and experience of the servant and the dangerous character of the machine he is directed to operate. This instruction was in harmony with the decisions of this court in Ertz v. Pierson, 130 Mich. 160, 89 N. W. 680, Allen v. Jakel, 115 Mich. 484, 73 N. W. 555, and Braasch v. Michigan Stove Co., 147 Mich. 676, 111 N. W. 197."

Marklewitz v. Olds Motor Works, 115 N. W. 1002.

"Respondent was injured while operating a jointer machine in appellant's factory. He was 38 years of age, a foreigner, had been in America five years, and was a cabinet maker by occupation. In another factory belonging to appellant he had from time to time operated a similar jointing machine, and for two months prior to the accident had occasionally operated the jointer in question in the new factory. He was an experienced cabinet maker, but not a machine operator, and his experience with jointing machines was incidental to his work as cabinet maker. The board kicked back and broke, thus throwing his left hand into the knives. The evidence clearly indicates that it was practicable to guard the machine with what is known as an automatic or stationary guard. * * It was established by the evidence that such machines had a tendency to kick back when small pieces of wood were passed through, especially if the knives were not in perfect shape, or if the wood was not accurately held. Respondent was directed by the foreman of the shop to plane off certain short pieces of wood, which were being used by him in the construction of some cabinet work. He knew the machine was not furnished with a guard, and, after using it awhile, discovered that one of the knives contained a nick, and noticed that the machine was not perfectly steady; but, owing to his limited experience, it cannot be said as a matter of law that he understoodthe danger and appreciated the risks of passing that kind of material through the machine."

Bigum v. St. Paul Sash, Door & Lumber Co., 119 N. W. 481.

"'It is the duty of the master not to expose an inexperienced servant and one unfamiliar with the employment and risks attendant thereon to a dangerous service, without giving him warning of the danger and instruction how to avoid it, unless both the danger and the means of avoiding it while he is performing the service required are apparent to the servant, and particularly is this true when the servant is ordered or directed to perform some service not contemplated in his original contract of employment.' The obligation which the law thus imposes on a master, to warn a servant of the dangerous character of the instrumentalities about which he is required to perform labor, is frequently invoked in behalf of an employe of immature years, because such a person does not ordinarily appreciate the hazard to which he is exposed, or practice that degree of discretion which servants of riper years usually estimate and generally exercise. This duty is not limited to an adolescent employe, however, but extends also to an adult servant who is inexperienced. Thus, in Ingerman v. Moore, 90 Cal. 410, 422, 27 Pac. 306, 25 Am. St. Rep. 138, in discussing this subject Mr. Justice Dehaven says: 'It is true, this rule, which requires the employer to give proper instructions, is most frequently applied in cases where persons of immature years are employed about dangerous machinery; but the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But, of course, the fact that the person injured was of mature years, as was the plaintiff here, is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position.'"

Elliff v. Oregon R. & N. Co., 99 Pac. 79.

"It will appear from the statement of the case that there was some evidence tending to show that the defendant in error was an inexperienced servant, and was changed from the work to which he had become accustomed, and set at work which involved greater

danger, without any warning or instruction as to the safest mode of doing the new work. Under such circumstances, and in this state of the case, we think the question of contributory negligence was a question of fact for the jury to determine. In view of such a state of the case, if the jury should find that the defendant in error was not sufficiently experienced to enable him to do the new work, and that he was neither warned nor instructed as to the proper mode of doing the work, we conclude that it could not be said as matter of law that the servant was guilty of contributory negligence in not making an inspection of the pole for himself, and in the particular method adopted of sawing off the section of the pole. It could not be said, upon the fact of this case, that defendant in error was guilty of negligence as matter of law if he supposed the pole was sound, and that he might safely do the work as it was done. If the pole was regarded, upon reasonable ground, as sound, it could not be said that the method of sawing, up to the time the section broke off and fell, was an obvious danger to an inexperienced servant without instruction or warning."

Western Union Tel. Co. v. Burgess, 108 Fed. 31.

"The plaintiff was 21 years old. He came from a farm to the defendant's pulp mill about two weeks before the accident. He had been a logger in the woods, but had not before worked on machinery. During these two weeks he had been 'lugging wood to use into the stove,' 'feeding the rack,' and 'cutting slabs' on a circular saw. Two or three times before the accident he had worked on the barker without difficulty from three-quarters of an hour to an hour. In the middle of the night he was roused from his bed by the night boss, and was set to work on the barker. About two hours later he barked a slab which still carried the spikes formerly driven into it. The sparks flew, and the knives were dulled. There was evidence tending to show that slabs having knots in them 'jumped' more than others when held against the barker; also that the jumping was greater when the knives were dull. The operator was then compelled

to increase his pressure on the slab against the disk. The jumping was generally away from the barker against the operator's pressure, but, two or three hours after the plaintiff's encountering the nails, a slab which he was pressing against the barker was thrown violently from the disk, his hands came in contact with the knives, and he lost three or four fingers. There was evidence that this more violent jumping occurred infrequently, once or twice a week. The plaintiff had never seen it, and testified that he had not been warned about it. The defendant asked the court to direct a verdict in its favor. The learned judge refused, and the defendant duly excepted. The jury found a verdict for the plaintiff, and the defendant brought this writ of error. In this court the defendant rested its case upon the plaintiff's alleged assumption of the risk involved in the operation of the barker, and his alleged contributory negligence.

"But the plaintiff had little experience with machinery, and had worked but little upon the machine in question when he was aroused at midnight, five or six hours before the accident happened. That the barker was in some respects dangerous he knew; that logs and slabs did not always lie quiet against the revolving disk his experience had proved. He found himself compelled to hold them there by the exercise of some force, but the evidence warranted the jury in finding that he did not know, when the dulled knives came in contact with knots or like obstacles, that the slab would occasionally be flung from the barker with great and extraordinary force beyond his strength to hold the slab in place, so that the protection given his hands by the slab might be suddenly removed and his fingers cut off. This danger called for a warning, and there was evidence that no warning had been given. Under all these circumstances, we are not able to say that the learned judge of the court below erred in submitting to the jury, under instructions otherwise unobjectionable, the question of the plaintiff's assumption of risk and contributory negligence."

Northern Lumber & Fibre Co. v. Paquette, 170 Fed. 718.

In the light of these decisions and with the facts shown to exist, it is claimed that the case should not be permitted to go to the jury. With such a contention we are emphatically at war.

In the case of

Busch v. Robinson, 81 Pac. 239,

the court said:

> "The next question in such order arises upon the motion for a non-suit. Much the same argument is advanced for defendant in support of the motion as in support of the assignment of error with relation to the demurrer, but it is supplemented by the further contention that plaintiff was guilty of contributory negligence. It was the duty of the defendant to furnish the plaintiff a safe place in which to work, and safe appliances to work with. This, as a principle of law obtaining between master and servant, is conceded. The contention involves three elements of inquiry: (1) Was the defect open and obvious? If not (2), did the plaintiff have knowledge of it, and continue in her employment with such knowledge? And (3) did the defendant have knowledge thereof, or should he have known of it if he had been reasonably diligent and cautious in observing the condition of the machine and its appliances, for the protection of his employes? All of these are matter of fact for the determination of a jury."

The Supreme Court of the United States in a decision recently made, announced the rule as to when a case should be disposed of by the court:

> "Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate, and assume the risk of it. Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. Ed. 382, 25 Supt. Ct. Rep. 164; Fitzgerald v. Connecticut River

Paper Co. 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

Butler v. Frazee, 29 Sup. Ct. Rep. 138.

Having in mind the foregoing principles of law, which are axiomatic, we submit that the doctrine of assumed risk is out of the question. The defendant in error was employed as a coal digger and the risks incident to that employment be assumed. He was taken from his employment for the moment and directed to run this engine, plaintiff in error not justified legally in assuming that he possessed any special knowledge regarding it. The conditions were such that he could not ordinarily appreciate the risks that this work exposed him to, and while he could observe the unguarded cog wheels negligently left unguarded, the danger to his inexeprienced mind was not obvious. The brake presented an unseen and latent risk which only became patent when the engine was in action, and under the circumstances the duty devolved upon the plaintiff in error, in sending him to run the

engine, to advise him of the dangers to which he was thus exposing himself. The question as to whether he was negligent on this state of facts and as to whether the risks were such that he was reckless in undertaking the work were for the jury to determine, and they were submitted to the jury under instructions of remarkable lucidity and clearness. The instructions referred to are as follows:

"There are certain duties which the law imposes upon a master toward his servant, in reference to providing for him a reasonably safe place in which to work, and reasonably safe appliances with which the work may be done. The servant has the right to assume that the master has used due diligence to provide suitable appliances for the operation of his business, and does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's method of prosecuting his business, but he may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of such knowledge without objection, without assuming the hazard incident to such a situation. In other words, if he knows of the defect, or if it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and if, in such a case, he is injured through the use of such defective apparatus, he cannot recover. You will remember that the law does not impose upon the master the necessity of providing machinery or appliances which are absolutely safe. It imposes upon him the obligation to use reasonable and ordinary care, skill and diligence in procuring, furnishing and maintaining suitable and safe machinery.

"When a servant enters into the service of an em-

ployer, he impliedly agrees that he will assume all the risks which are ordinarily and naturally incident to the particular service, in which he engages, and if, in this case, you believe that the injury to Kovec was only the result of one of the risks ordinarily incident to the work in which he was engaged, and not otherwise, then he can not recover, and your verdict should be for the defendant;

"The question of assumption of risk is perhaps best understood when we consider the many employments which men seek. Some are very hazardous. Mining is a hazardous employment. When a man goes into mining, he takes upon himself those risks which are ordinarily connected with the business of mining. When a man works in a smelter or other places where streams of molten metal are coming out, he undertakes a very hazardous employment. The nature of the business, in itself, is hazardous, and he goes into it assuming those risks which are ordinraily incidental to the business so undertaken by him.

"The law imposes upon the master the degree of care that I have explained to furnish reasonably safe appliances, and it imposes upon the servant the duty of exercising ordinary care to prevent being injured. The duties are correlative. Duties are imposed upon master and upon servant. Common experience tells us this. We think of the situations that are presented to men in factories undertaking employment where they are surrounded by dangerous machinery. The law must require the care commensurate with the nature of the business on the part of the master, and the care commensurate with the nature of the business on the part of the servant.

"I think I have already told you that when the servant, in accepting his employment, he does not assume those occasioned by the negligence of the master. In this case, Kovec assumed the ordinary risks incident to the work he was called upon to perform; yet he did not assume those,—if there were any such,—arising from the negligence of the defendant company. You will remember that Kovec says that he was employed as a coal digger, and was acting in that capacity in the employ of this defendant; that he was never employed by the defendant to operate ma

chinery, and never represented to the company, either expressly or impliedly, that he had any knowledge of machinery; and that on the day of the accident, he was directed by the represetnative of the company to operate the hoisting machine; that the work connected with its operation was dangerous; and that he was ignorant, through inexperience, of these dangers; all of which facts, he says, were known, or by the exercise of reasonable diligence, could have been known, by the defendant. If you find these facts to be true, then the duty devolved upon the defendant company, before exposing the plaintiff to such dangers, to instruct and caution him in such a manner that he would be able to comprehend such dangers, and do the work with reasonable safety and proper care on his part. If you find from the evidence that these are the facts, and that the injury complained of by Kovec, resulted from this failure to instruct him, he would be entitled to recover, unless you should find that in operating the engine in question, he assumed the risks incident to its operation, as explained to you, or unless the injury that he received was the result of contributory negligence on his own part.

"Now, a master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he was engaged, and against which, the servant, through want of skill, could not presumably defend himself if not advised of danger. He is bound to warn the servant of the danger, if it is not obvious, and to instruct him how it may be avoided. But if the servant be of mature years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such cases the master is not liable for injury happening to the servant in the performance of dangerous work, without the scope of his ordinary employment, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and, without objection, undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. The liability upon the master in cases of injury to the servant received in a dangerous employ-

ment outside of that for which he was originally employed, arises not from the direction of the master to the servant to depart from the original service, and engage in the more dangerous work, but from the failure of the master to warn the servant of the attendant danger in cases where the danger is not obvious, or where the servant is unable to comprehend the danger. The master is under no obligation to warn against dangers which are obvious and ordinary; but the master owes the duty to the employee who is directed to perform a hazardous or dangerous task, or to work in a dangerous place, when the employee, through inexperience or general incapacity, does not comprehend the dangers, and this inexperience or general incapacity is known to the master, or by the exercise of reasonable diligence could be known, to point out to the servant the dangers incident to the employment, and thus enable him to comprehend, and so avoid them. A neglect to discharge such duty renders the master liable for such injuries as the servant may sustain through the failure of the master to so instruct and advise. And it is for you to say, after weighing all the evidence in the case, whether the operation of the hoisting engine in question, in the manner in which it was operated, and the circumstances connected with its operation, was hazardous and dangerous, so as to have required the defendant to have instructed Kovec, and whether or not the plaintiff was inexperienced and lacking in capacity.

"The contention is also made by the plaintiff that the defendant company was negligent in not providing a suitable cover or shield for the gearing into which his hand fell. As I have explained to you, the master is required to exercise reasonable care in providing a reasonably safe place for the servant to work, and reasonably safe appliances and machinery with which to work, and if the master proves negligent in that duty, and the servant is injured on account thereof, he is entitled to recover for such injuries as he may sustain unless he was guilty of contributory negligence, or unless he assumed the risk from its use in the situation in which it was. As to whether he assumed the risk, it is proper for the jury to consider where the gearing was, and whether or not he was required to

come in contact with it in the ordinary operation of the machine.

"The defendant contends that the injury which Kovec received was brought about by his own contributory negligence. That is to say, that through his own neglect, he contributed directly to the injury which he received. Now, contributory negligence is an affirmative defense. The duty of the plaintiff is to make out a case of negligence against the defendant, and if the defendant comes into court and says that the plaintiff was guilty of contributory negligence, upon that defense the defendant assumes the burden. If you find, in considering all the evidence, that the plainitff was guilty of contributory negligence in attempting to operate the machine in the manner in which he did, letting his foot slip, or if he missed the brake by reason of carelessness on his part, and thus contributed to the injury that he received, he can not recover. If you believe that the foreman ordered Kovec to operate the engine in quetsion, but did not instruct him in the method of its operation, that order would not relieve the plaintiff from exercising the care and prudence that an ordinarily careful person would exercise under the circumstances, and if the plaintiff did not understand the operation of the engine, yet did not exercise the care that an ordinarily prudent man would have exercised, under the circumstances, but without knowing how to operate the engine, undertook to run it, and negligently and carelessly undertook to put his foot upon the brake, and by reason of his negligence in so doing, fell or was thrown into the gearing of the machine, and that his negligence in attempting to operate the engine and in attempting to put his foot upon the brake, was the proximate cause of the injury he received, then the plaintiff is not entitled to recover. That is to say, gentlemen, it comes back to the proposition that the duty of the servant is a correlative one. He must exercise care to avoid injury to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or as are discernible by ordinary care on his part, as the master is to provide for him. A man can not go blindly into a terrible danger, and, if he is

injured, hold his employer, but whether he does go blindly into it is a question of fact. Now, consider whether or not Kovec was told to operate that engine; consider the engine; consider the brake; the gearing was exposed; there is no question about that. But it seems to me that you will find the more material matter in the case to be the question of the operation of the machine by the brake. Consider whether the plaintiff acted as a man of ordinary prudence would have acted; whether or not, when he saw the exposed gearing, he acted as a man of ordinary prudence and care would not have acted. Those are questions to be arrived at by a fair consideration of all the evidence there is in the case. You may believe that the plaintiff was not employed to do the work in which he was engaged at the time of the injury, yet if you believe that he engaged in the work without objection, and that the risks and dangers thereof were open and patent to his sight and understanding, then he occupies the same position he would have occupied if he had been originally employed to run the engine, and if he was injured by reason of such open and patent risk, if there was any such,—his injury was the result of risks which were assumed by him, and he is not entitled to recover."

Hess vs. Rosenthal. 43 N.E. 743.

endant in error was a volunteer. He was directed to run the engine and his refusal to do so meant, as he believed, his dismissal.

Transcript, pages 36, 46, 49.

We respectfully submit that the judgment should be affirmed.

MILLER & O'CONNOR and
WALSH & NOLAN,
Attorneys for Defendants in Error.

No. 1710

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Plaintiffs in Error,

vs.

T. H. BENTON,

Defendant in Error.

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Upon Writ of Error to the United States Circuit Court for the Northern District of California.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

CORBET & SELBY, Attorneys for Plaintiffs in Error and Defendants, 704 Market St., San Francisco, California.

REID & DOZIER, Attorneys for Defendant in Error and Plaintiff, Redding, Shasta County, California.

In the Superior Court of the County of Shasta, State of California.

Dept. No. 2.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Complaint.

Comes now the plaintiff in the above-entitled action, and complaining of the defendants, for cause of action alleges:

I.

That the defendants, William E. Kelley and Allan H. Daugharty, are now, and at all the times herein mentioned were, copartners, doing business under the firm name and style of W. E. Kelley & Company.

II.

That on the 27th day of May, 1905, the plaintiff

and defendants entered into a written contract, by which the plaintiff was to sell and deliver to the defendants, in the County of Shasta, State of California, all of the California sugar and white pine lumber that he manufactured at his sawmill near Plateau in the County of Shasta, State of California, during the season of 1905, of the grades of No. 2 shop and better; and whereby the defendants were to pay to the plaintiff the sum of Twenty-four Dollars ($24.00) per thousand feet for each and every thousand feet of said lumber delivered to the defendants in the county of Shasta, State of California; a copy of which said contract is hereunto annexed, marked Exhibit "A" and made a part of this complaint.

III.

That in compliance with said contract, the said plaintiff did deliver to the said defendants, in the county of Shasta, State of California, California sugar and white pine lumber of the grades of No. 2 shop and better, to the extent of two million two hundred and ninety-seven thousand, one hundred and seventy-five feet (2,297,175 ft.), and the said defendants did receive of and from the plaintiff, under the terms of said contract, two million two hundred and ninety-seven thousand one hundred and seventy-five feet (2,297,175 ft.) of California sugar and white pine lumber of the grades of No. 2 shop and better.

IV.

That by reason of the sale and delivery of said lumber to said defendants, the said defendants became indebted to the plaintiff in the sum of Fifty-

five Thousand One Hundred and Thirty-two and 20/100 Dollars ($55,132.20) in gold coin of the United States.

V.

That the said defendants have not paid the said plaintiff the said sum of Fifty-five Thousand One Hundred and Thirty-two and 20/100 Dollars ($55,-132.20), or any part thereof, save and except the sum of Forty-five Thousand One Hundred and Sixty-four Dollars ($45,164.00); and there is still due, owing and unpaid from the said defendants to the said plaintiff the sum of Nine Thousand Nine Hundred and Sixty-eight and 20/100 Dollars ($9,968.20).

VI.

That said indebtedness was incurred and was and is payable in the State of California.

Wherefore, the plaintiff demands judgment against the defendants, for the sum of Nine Thousand Nine Hundred and Sixty-eight and 20/100 Dollars ($9,968.20), in gold coin of the United States of America, together with interest thereon, from the date of the filing of this action, until the entry of judgment; and for costs of suit.

REID & DOZIER,
Attorneys for Plaintiff.

Exhibit "A" [to Complaint].

Platteau, Shasta Co., Cal., 5/27/05

W. E. Kelley & Co.

901 Chamber Commerce, Chicago, Ill.

Gentlemen: For and in consideration of One Dollar ($1.00) to me in hand paid, receipt of which I herewith acknowledge; I hereby offer to sell you all

the No. two Shop and better California Sugar and White pine that I manufacture at my Saw Mill near Platteau, during the season of 1905.

All grades mentioned in this contract are the same as per rules adopted Apr. 1st, 1903, by the Cal. Sug. & W. P. Agency—

All lumber to be delivered at Cottonwood, Cal. and piled in some convenient place near the Southern Pacific R. R. for shipment as directed by you.

The price of above lumber to be Twenty-four Dollars ($24.00) per M for all grades.

The terms of payment to be 60 ds from shipment or 2% off for cash (at my option) from face of invoice; cash payments to be made by your San Francisco office drawing sight draft on your Chicago office and remitting same promptly to Bank of Tehama County, Red Bluff Cal. for credit on my account.

The sugar & white Pine to be delivered separately, also the several thicknesses of each to be delivered separate.

In the matter of delivery, my terms will, upon arriving with a load at point of delivery present your representative with our shipping tally in duplicate and if said load arrives in apparent good order you are to O. K. one copy & return to us. If for any reasons loads appear damaged or short you to make notation of same on tally that is returned to us, this is for our convenience in keeping a check on our teamsters.

After lumber is delivered at R. R. by us you are to ship the same within thirty days, as soon as lumber is shipped by you; you are to furnish us promptly

with a copy of tally showing the number of feet shipped by your men.

I am to always have the privilege of keeping an inspector on the ground to keep a check on your inspector if I desire.

In the event of your not shipping any portion of the above lumber within 30 ds from the time it is rec'd, you are at my request to make an estimate of said lumber and make settlement for same as per above terms.

It is understood that the above settlement based on estimates is not to be final, but is subject to adjustment after the final inspection at time of shipment is made by you.

All lumber is to be delivered by me, dry and in first class manner.

All lumber is to be properly edged and otherwise properly manufactured.

The above proposition does not refer to any stained lumber which I may have, should I have any of such lumber it is subject to further negotiation at the option of both parties.

All lumber to be manufactured to standard lengths widths and thicknesses.

You agree to take all my short clear 5/4. 6/5 & 8/4, 10″ & over wide 4 ft. & over long or if 6 ft. 8″ or over long it may be 5¼ inches & up wide @ $20.00 per M at same point of delivery & terms.

And Sugar Pine I deliver in excess of 15% of the total cut, you are to pay me three dollars ($3.00) per M extra for.

All lumber to be manufactured as nearly as possible to your trade requirements as you advise us from time to time, but I reserve the right to not cut anything over 3 inches thick, and not to cut over 50 M 3" and 100 M 2½" and none over 16 ft. long.

Yours truly,

T. H. BENTON.

Accepted:

W. E. KELLEY & CO.
By FRANK W. WARREN.

State of California,
County of Shasta,—ss.

T. H. Benton, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

T. H. BENTON.

Subscribed and sworn to before me this 5th day of June, 1906.

[Notarial Seal] THOMAS B. DOZIER,
Notary Public in and for the County of Shasta, State of California.

[Endorsed]: Original. No. 3478. File 181. In the Superior Court, County of Shasta, State of California. Dep. No. 2. T. H. Benton, Plaintiff, vs. William E. Kelley, and Allan H. Daugharty, Copartners, Doing Business Under the Firm Name and

Style of W. E. Kelley & Company, Defendants. Complaint. Filed Jun. 5, 1906. 190. W. O. Blodgett, Clerk. By ————, Deputy Clerk. Reid & Dozier, Redding, Shasta County, Cal., Attorneys for Plff.

In the Superior Court of the County of Shasta, State of California.

Dept. No. 2.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Affidavit for Attachment.

State of California,
County of Shasta,—ss.

T. H. Benton, being duly sworn, says:

That he is the plaintiff in the above-entitled action; that the defendants in said action are indebted to said plaintiff in the sum of Nine Thousand Nine Hundred and Sixty-eight and 20/100 Dollars ($9,968.20), gold coin of the United States (upon an express contract for the direct payment of money, to wit: for lumber sold and delivered to the defendants, under and by virtue of a written contract dated the 27th day of May, 1905, over and above all legal set-

offs or counterclaims, and that the said defendants are, and each of them is, a nonresident of this State.

That the said attachment is not sought, and the said action is not prosecuted to hinder, delay or defraud any creditor of the said defendants, or either of them.

T. H. BENTON.

Subscribed and sworn to before me this 5th day of June, A. D. 1906.

[Notarial Seal] THOMAS B. DOZIER,
Notary Public in and for the County of Shasta, State of California.

[Endorsed]: Dept. No. 2. No. 3478. File 181. In the Superior Court, County of Shasta, State of California. T. H. Benton, Plaintiff, vs. William E. Kelley and Allan H. Daugharty, Copartners, Doing Business Under the Firm Name and Style of W. E. Kelley & Company, Defendants. Affidavit for Attachment. Filed Jun. 5, 1906. 190. W. O. Blodgett, Clerk. By ————, Deputy Clerk. Reid & Dozier, Redding, Shasta County, Cal., Attorneys for Plf.

In the Superior Court of the County of Shasta, State of California.

Dept. No. 2.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Undertaking on Attachment.

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the Superior Court of the County of Shasta, State of California, against the above-named defendants, upon contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendants, the sum of Nine Thousand Nine Hundred and Sixty-eight and 20/100 Dollars ($9,968.20), gold coin of the United States, together with interest on said sum from the date of the filing of this action until the entry of judgment; and is about to apply for an attachment against the property of the said defendants as security for the satisfaction of any judgment that may be recovered therein;

Now, therefore, we the undersigned, residents of the County of Shasta, State of California, in consideration of the premises, and of the issuing of said

attachment, do jointly and severally undertake in the sum of Five Hundred Dollars ($500.00), and promise to the effect, that if the said defendants recover judgment in said action, the said plaintiff will pay all costs that may be awarded to the said defendants, and all damages which they may sustain by reason of said attachment, not exceeding in the sum of Five Hundred Dollars.

T. J. HOUSTON. [Seal]
WM. MENZEL. [Seal]

Dated at Redding, this 5th day of June, A. D. 1906.

State of California,
County of Shasta,—ss.

T. J. Houston and Wm. Menzel, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says: That he is a resident and householder in the County of Shasta, State of California, and is worth the sum in said Undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

T. J. HOUSTON,
WM. MENZEL.

Subscribed and sworn to before me this 5th day of June, A. D. 1906.

[Notarial Seal] D. G. REID,
Notary Public in and for the County of Shasta, State of California.

[Endorsed]: Dep. No. 2. No. 3478. File 181. In the Superior Court, County of Shasta, State of

California. T. H. Benton, Plaintiff, vs. William E. Kelley and Allan H. Daugharty, Copartners, doing Business Under the Firm name and Style of W. E. Kelley & Company, Defendants. Undertaking on Attachment. Filed Jun. 5, 1906. 190. W. O. Blodgett, Clerk. By ————, Deputy Clerk. Reid & Dozier, Redding, Shasta County, Cal., Attorneys for Plf.

C. H. Behrnes, Under-Sheriff.
M. D. Lack, Office Deputy and Collector.

Office of
SHERIFF AND TAX COLLECTOR,
Shasta County, California.
J. L. RICHARDSON.

Redding, Cal., ————, 190—.

Sheriff's Office,
County of Shasta,
State of California,—ss.

I, James L. Richardson, Sheriff of the County of Shasta, do hereby certify that I received the within and hereunto annexed Writ of Attachment on the 8th day of June, A. D. 1906, and by virtue of the same endeavored to execute the same by proceeding to attach the property of the defendants therein named, at the town of Anderson, in said County of Shasta, State of California. That before completing and returning said Writ of Attachment the Defendants gave me security by an undertaking, with sufficient sureties, in the sum of Eleven Thousand ($11,000) Dollars, sufficient to satisfy plaintiff's demand, besides costs, I

have taken said undertaking and herewith return said Writ without further service.

JAMES L. RICHARDSON,
Sheriff of Shasta County, California.

Dated at Redding, Calif., this 16th day of June, 1906.

Sheriff's Office,
County of Shasta,
State of California,—ss.

Return on Garnishment on Individual Who Made No Statement.

I, James L. Richardson, Sheriff of the County of Shasta, do hereby certify and return that I received the hereunto annexed Writ of Attachment on the 8th day of June, A. D. 1906, and by virtue thereof I have duly attached all moneys, goods, effects, debts, due or owing, or any other personal property belonging to the defendants therein named or either of them, in the possession or under the control of Frank W. Warren and George D. Horner, copartners, by delivering to and leaving with said Frank W. Warren, personally in the county of Shasta, on the 8th day of June, A. D. 1906, a copy of said Writ of Attachment with a notice in writing indorsed thereon that such property was attached by virtue of said Writ, and not to pay over or transfer the same to anyone but the Sheriff of Shasta County, or someone legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which

said Frank W. Warren has failed, neglected and refused to answer.

JAMES L. RICHARDSON,
Sheriff.

Sheriff's fees $———.

By ————,
Sheriff.

Dated at Redding, Calif., this 16th day of June, A. D. 1906.

In the Superior Court of the County of Shasta, State of California.

Dept. No. 2.

T. H. BENTON,
Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,
Defendants.

Writ of Attachment.

The People of the State of California, to the Sheriff of the County of Shasta, State of California, Greeting:

Whereas, the above-entitled action was commenced in the Superior Court of the County of Shasta, State of California, by the plaintiff in said Action, to recover from the defendants in said Action, the sum of Nine Thousand Nine Hundred and Sixty-eight and 20/100 Dollars ($9,968.20), together with interest on

said sum from the date of the filing of the Complaint until the entry of judgment, and for costs of suit; and the necessary Affidavit and Undertaking herein having been filed as required by law;

Now, we do hereby command you, the said sheriff, that you attach and safely keep all the property of the said defendants within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff demand, as above mentioned; unless the said defendants give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take said undertaking, and hereof make due and legal service and return.

Witness Hon. GEO. W. BUSH, Judge of the said Superior Court, this 5th day of June, A. D. 1906.

Attest my hand and the seal of said court, the day and year last above written.

[Seal of Superior Court] W. O. BLODGETT,
Clerk of the Superior Court of the County of Shasta, State of California.

By ————,
Deputy.

[Endorsed]: Dep. No. 2. No. 3478. File 181. In the Superior Court, County of Shasta, State of California. T. H. Benton, Plaintiff, vs. William E. Kelley and Allan H. Daugharty, Copartners, Doing Business Under the Firm Name and Style of W. E.

Kelley & Company, Defendants. Writ of Attachment. Filed June 6, 1906. W. O. Blodgett, Clerk. By Jno. Witherow, Deputy Clerk. Reid & Dozier, Redding, Shasta County, Cal., Attorneys for Plf.

Rec'd June 8th, 1906, at 9 A. M.

J. L. RICHARDSON,
Sheriff.
By M. D. Lack,
Deputy.

In the Superior Court of the State of California, in and for the County of Shasta.

Department No. 2. No. 3478. File 181.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Appearance by Defendants.

To T. H. Benton, Plaintiff in the Action Above Entitled, and Messrs Reid & Dozier, Attorneys for said T. H. Benton, Plaintiff:

You are hereby notified that the undersigned, Burke Corbet, whose residence and place of business is at 2650 Scott Street, in the City and County of San Francisco, and State of California, has been retained by and does hereby appear in the above stated action for the above-named defendants, William E.

Kelley and Allan H. Daugharty, and does hereby demand that a copy of the complaint and all further pleadings in said action be served upon him at his office at the above address.

Dated June 13th, 1906.

BURKE CORBET,

Attorney for W. E. Kelley and Allan H. Daugharty, Defendants.

Due and personal service of the foregoing notice of appearance upon us is admitted at Redding, Shasta County, California, this 18th day of June, 1906.

REID & DOZIER,

Attorneys for Plaintiff, T. H. Benton.

[Endorsed]: #3478. File 181. In the Superior Court of the County of Shasta, State of California. T. H. Benton, Plaintiff, vs. William E. Kelley et al., Defendants. Notice of Appearance by Defendants. Filed June 18, 1906. W. O. Blodgett, Clerk. S. N. Witherow, Deputy.

In the Superior Court of the State of California, in and for the County of Shasta.

Department No. 2. No. 3478. File No. 181.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Petition [for Removal of Cause].

To the Honorable, the Superior Court in and for the County of Shasta, State of California:

The petition of William E. Kelley and Allan H. Daugharty, individually and as copartners, doing business under the firm name and style of W. E. Kelley & Company respectfully shows to the Court:

That on the first day of June, A. D. 1906, and at all times since said date, the above-named T. H. Benton, the plaintiff in the above stated action, was and still is a citizen of and residing within the State of California, and that on said 1st day of June, A. D. 1906, and at all times since said date, the above-named William E. Kelley and Allan H. Daugharty, defendants in the above-stated action, and each of them, were and still are nonresidents of the State of California; that said William E. Kelley and Allan H. Daugharty and each of them were, on the 1st day of June, 1906, and at all times since said date have been and still are citizens of and residing within the State of Illinois;

That on the 5th day of June, A. D. 1906, there was brought in the Superior Court of the State of California, in and for the County of Shasta, a suit at law of a civil nature, which said suit is still pending;

That the above-named T. H. Benton was and still is the plaintiff in said suit, and the above-named William E. Kelley and Allan H. Daugharty, copartners doing business under the firm name and style of

W. E. Kelley & Company, were and still are the defendants therein;

That the subject matter of said suit is a controversy between said T. H. Benton, as plaintiff, and the said William E. Kelley and Allan H. Daugharty, copartners doing business under the firm name and style of W. E. Kelley & Company, as defendants, over the payment of a certain sum of money, which exceeds, exclusive of interest and costs, the sum of Two Thousand Dollars ($2,000); that said suit is one of which the Circuit Court of the United States, in and for the Northern District of California, had and has original cognizance thereof, concurrent with the above-stated State Court; said suit is of a civil nature at common law;

That the subject matter of said suit is a controversy between T. H. Benton, as plaintiff, who at the time of the commencement of said suit was and still is a citizen of the State of California, and William E. Kelley and Allan H. Daugharty, defendants, each of whom at the time of the commencement of said suit was and still is a citizen of the State of Illinois; that the matter in dispute in said controversy and said suit exceeds, exclusive of interest and costs, the sum of Two Thousand Dollars ($2,000);

Therefore, your petitioners pray that the Superior Court in and for the County of Shasta, State of California, accept this petition and the bond presented herewith by your petitioners, and the security offered by said bond, and that said Superior Court proceed no further in said suit; and that said suit be transferred from the Superior Court in and for the

County of Shasta, State of California, to the Circuit Court of the United States, in and for the Northern District of California.

Dated this 13th day of June, A. D. 1906.

WILLIAM E. KELLEY,
ALLAN H. DAUGHARTY,
By BURKE CORBET,
Their Attorney.

State of California,
City and County of San Francisco,—ss.

Burke Corbet, being first duly sworn according to law, deposes and says: That he is the attorney for William E. Kelley and Allan H. Daugharty, the defendants in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the facts set forth and stated in said petition are true and correct to the best of his knowledge and belief.

BURKE CORBET.

Subscribed and sworn to before me, this 14th day of June, A. D. 1906.

[Seal] OLIVER DIBBLE,
Notary Public in and for the City and County of San Francisco, State of California.

In the Superior Court of the State of California, in and for the County of Shasta.

Department No. 2. No. 3478. File No. 181.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Order [for Removal of Cause].

The petition of William E. Kelley and Allan H. Daugharty, and the bond presented with said petition in the suit set forth in said petition, wherein T. H. Benton is plaintiff, and William E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and style of W. E. Kelley & Company, are defendants, are hereby accepted; that the security offered by said bond be accepted; that the said suit be removed to the Circuit Court of the United States in and for the Northern District of California; that this Court proceed no further therein.

Redding, California, June 18th, 1906.

GEO. W. BUSH,

Judge of the Superior Court, Shasta County, State of California.

[Endorsed]: Filed June 18, 1906. W. O. Blodgett, Clerk. By S. N. Witherow, Deputy.

Bond on Removal of Cause.

Know All Men by These Presents: That we, William E. Kelley and Allan H. Daugharty, as principals, and National Surety Company, a corporation organized and existing under the laws of the State of New York, as surety, are held and firmly bound unto T. H. Benton, in the penal sum of Five Hundred Dollars ($500), for the payment whereof, well and truly to be made to said obligee, his heirs, executors, and administrators, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 14th day of June, A. D. 1906.

The condition of the foregoing obligation is such,

That Whereas, William E. Kelley and Allan H. Daugharty, individually and as copartners under the firm name and style of W. E. Kelley & Company, have petitioned the Superior Court of the State of California, in and for the County of Shasta, for the removal of a certain suit therein pending, wherein said T. H. Benton is plaintiff, and the said William E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and style of W. E. Kelley & Company, are defendants to the Circuit Court of the United States, for the State of California, Northern District;

Now, if the said William E. Kelley and Allan H. Daugharty, petitioners, shall enter, in said Circuit Court of the United States for the State of Califor-

nia, Northern District, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, to be and remain in full force and effect.

WILLIAM E. KELLEY, [Seal]
ALLAN H. DAUGHARTY, [Seal]
By BURKE CORBET,
Their Attorney.

[Seal] NATIONAL SURETY COMPANY,
By JOHN H. ROBERTSON,
Its Attorney in Fact.

State of California,
City and County of San Francisco,—ss.

On this 14th day of June, A. D. One Thousand Nine Hundred and Six (1906), before me, the undersigned, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared John H. Robertson, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National Surety Company, a corporation, and the said John H. Robertson, acknowledged to me that he subscribed the name of The National Surety Company thereto as principal and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City

and County of San Francisco, the day and year first above written.

[Seal] OLIVER DIBBLE,

Notary Public in and for the City and County of San Francisco, State of California.

The security offered by the foregoing bond be and the same hereby is accepted, and the Clerk of this Court will make an order accordingly.

June 18th, 1906.

GEO. W. BUSH,

Judge of the Superior Court, in and for the County of Shasta, State of California.

[Endorsed]: Filed June 18, 1906. W. O. Blodgett, Clerk. By S. N. Witherow, Deputy.

Clerk's Certificate to Record on Removal.

County Clerk's Office,
County of Shasta,—ss.

I, W. O. Blodgett, County Clerk of the County of Shasta, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full and correct copy of Complaint, Affidavit of Attachment, Undertaking on Attachment, Writ of Attachment, Notice of Appearance by Defendants, Petition for Removal, Removal Bond, and Order of Removal, in the matter of the case of T. H. Benton vs. William E. Kelley and Allan H. Daugharty, etc., now on file and of record in my office.

Witness my hand and the seal of said Court this 19th day of June, 1906.

[Seal] W. O. BLODGETT,
Clerk.

[Endorsed]: Filed June 20, 1906. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, for the Ninth Circuit, District of Northern California.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY, ALLAN H. DAUGHARTY, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Demurrer.

And now comes the above-named defendants and demur to the complaint of the plaintiff in the action above entitled upon the grounds and for the following reasons:

That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants demand that the complaint of the plaintiff be dismissed.

Dated June 23d, A. D. 1906.

BURKE CORBET,
Attorney for Defendants.

Due and personal service of the foregoing demurrer admitted upon me this 25th day of June, 1906.

REID & DOZIER,
Attorneys for Plaintiff.

[Endorsed]: Filed June 28, 1906. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States for the Ninth Circuit, District of Northern California.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY, ALLAN H. DAUGHARTY, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Bill of Particular Items.

In response to the demand of the defendants made for a Bill of Particular Items, the plaintiff herewith submits the following Items of Account, by date and amount and a Statement of Account, showing the dates and amounts of the respective payments made thereon by the said defendants.

1905.

June 6. To 19,376 feet yellow and sugar pine lumber.
June 7. To 37,176 feet yellow and sugar pine lumber.
June 8. To 20,981 feet yellow and sugar pine lumber.
June 9. To 29,354 feet yellow and sugar pine lumber.
June 10. To 14,379 feet yellow and sugar pine lumber.
June 11. To 32,894 feet yellow and sugar pine lumber.
June 12. To 29,965 feet yellow and sugar pine lumber.
June 13. To 27,229 feet yellow and sugar pine lumber.
June 14. To 18,172 feet yellow and sugar pine lumber.
June 15. To 69,436 feet yellow and sugar pine lumber.
June 16. To 14,120 feet yellow and sugar pine lumber.
June 17. To 3,792 feet yellow and sugar pine lumber.
June 18. To 8,800 feet yellow and sugar pine lumber.

June 18. To 4,566 feet yellow and sugar pine lumber.
June 19. To 28,924 feet yellow and sugar pine lumber.
June 20. To 12,836 feet yellow and sugar pine lumber.
June 21. To 32,727 feet yellow and sugar pine lumber.
June 22. To 21,471 feet yellow and sugar pine lumber.
June 23. To 28,000 feet yellow and sugar pine lumber.
June 24. To 17,685 feet yellow and sugar pine lumber.
June 25. To 22,527 feet yellow and sugar pine lumber.
June 26. To 19,221 feet yellow and sugar pine lumber.
June 27. To 15,785 feet yellow and sugar pine lumber.
June 28. To 20,836 feet yellow and sugar pine lumber.
June 29. To 11,550 feet yellow and sugar pine lumber.
June 30. To 18,996 feet yellow and sugar pine lumber.
July 1. To 6,665 feet yellow and sugar pine lumber.
July 2. To 6,115 feet yellow and sugar pine lumber.
July 3. To 18,380 feet yellow and sugar pine lumber.

1905.

July 4. To 3,480 feet yellow and sugar pine lumber.
July 5. To 11,894 feet yellow and sugar pine lumber.
July 6. To 9,091 feet yellow and sugar pine lumber.
July 7. To 14,804 feet yellow and sugar pine lumber.
July 8. To 18,177 feet yellow and sugar pine lumber.
July 9. To 13,554 feet yellow and sugar pine lumber.
July 10. To 13,005 feet yellow and sugar pine lumber.
July 11. To 25,110 feet yellow and sugar pine lumber.
July 12. To 22,358 feet yellow and sugar pine lumber.
July 13. To 25,786 feet yellow and sugar pine lumber.
July 14. To 14,061 feet yellow and sugar pine lumber.
July 15. To 24,685 feet yellow and sugar pine lumber.
July 16. To 10,294 feet yellow and sugar pine lumber.
July 18. To 20,270 feet yellow and sugar pine lumber.

July 19. To 14,004 feet yellow and sugar pine lumber.
July 20. To 35,934 feet yellow and sugar pine lumber.
July 21. To 13,501 feet yellow and sugar pine lumber.
July 22. To 16,551 feet yellow and sugar pine lumber.
July 23. To 6,968 feet yellow and sugar pine lumber.
July 24. To 17,374 feet yellow and sugar pine lumber.
July 25. To 19,032 feet yellow and sugar pine lumber.
July 26. To 19,907 feet yellow and sugar pine lumber.
July 27. To 11,204 feet yellow and sugar pine lumber.
July 28. To 1,292 feet yellow and sugar pine lumber.
July 29. To 17,147 feet yellow and sugar pine lumber.
July 30. To 7,725 feet yellow and sugar pine lumber.
July 31. To 9,579 feet yellow and sugar pine lumber.
Aug. 1. To 12,621 feet yellow and sugar pine lumber.
Aug. 2. To 30,560 feet yellow and sugar pine lumber.
Aug. 3. To 11,297 feet yellow and sugar pine lumber.
Aug. 4. To 29,737 feet yellow and sugar pine lumber.
Aug. 5. To 15,553 feet yellow and sugar pine lumber.
Aug. 6. To 24,827 feet yellow and sugar pine lumber.
Aug. 7. To 8,644 feet yellow and sugar pine lumber.
Aug. 8. To 23,129 feet yellow and sugar pine lumber.
Aug. 9. To 8,689 feet yellow and sugar pine lumber.
Aug. 10. To 37,315 feet yellow and sugar pine lumber.
Aug. 11. To 10,329 feet yellow and sugar pine lumber.
Aug. 12. To 15,210 feet yellow and sugar pine lumber.
Aug. 13. To 18,300 feet yellow and sugar pine lumber.
Aug. 15. To 22,811 feet yellow and sugar pine lumber.
Aug. 16. To 7,974 feet yellow and sugar pine lumber.
Aug. 17. To 16,284 feet yellow and sugar pine lumber.
Aug. 18. To 10,238 feet yellow and sugar pine lumber.
Aug. 19. To 22,610 feet yellow and sugar pine lumber.
Aug. 20. To 11,942 feet yellow and sugar pine lumber.

Aug. 21. To 15,134 feet yellow and sugar pine lumber.
Aug. 22. To 13,679 feet yellow and sugar pine lumber.
Aug. 23. To 22,222 feet yellow and sugar pine lumber.
Aug. 25. To 32,242 feet yellow and sugar pine lumber.
Aug. 26. To 24,789 feet yellow and sugar pine lumber.
Aug. 27. To 1,685 feet yellow and sugar pine lumber.
Aug. 29. To 9,621 feet yellow and sugar pine lumber.
Aug. 30. To 4,013 feet yellow and sugar pine lumber.
Aug. 31. To 17,669 feet yellow and sugar pine lumber.
1905.
Sept. 2. To 15,387 feet yellow and sugar pine lumber.
Sept. 4. To 3,579 feet yellow and sugar pine lumber.
Sept. 4. To 3,762 feet yellow and sugar pine lumber.
Sept. 5. To 12,015 feet yellow an dsugar pine lumber.
Sept. 6. To 5,519 feet yellow and sugar pine lumber.
Sept. 8. To 18,854 feet yellow and sugar pine lumber.
Sept. 9. To 7,782 feet yellow and sugar pine lumber.
Sept. 10. To 13,256 feet yellow and sugar pine lumber.
Sept. 11. To 16,254 feet yellow and sugar pine lumber.
Sept. 12. To 8,493 feet yellow and sugar pine lumber.
Sept. 13. To 16,470 feet yellow and sugar pine lumber.
Sept. 14. To 30,310 feet yellow and sugar pine lumber.
Sept. 15. To 14,378 feet yellow and sugar pine lumber.
Sept. 16. To 10,642 feet yellow and sugar pine lumber.
Sept. 17. To 13,479 feet yellow and sugar pine lumber.
Sept. 18. To 19,023 feet yellow and sugar pine lumber.
Sept. 19. To 12,531 feet yellow and sugar pine lumber.
Sept. 20. To 23,205 feet yellow and sugar pine lumber.
Sept. 21. To 16,915 feet yellow and sugar pine lumber.
Sept. 22. To 39,050 feet yellow and sugar pine lumber.
Sept. 23. To 24,007 feet yellow and sugar pine lumber.
Sept. 24. To 47,727 feet yellow and sugar pine lumber.

Sept. 25. To 14,741 feet yellow and sugar pine lumber.
Sept. 26. To 20,821 feet yellow and sugar pine lumber.
Sept. 27. To 14,983 feet yellow and sugar pine lumber.
Sept. 29. To 3,000 feet yellow and sugar pine lumber.
Oct. 2. To 21,854 feet yellow and sugar pine lumber.
Oct. 3. To 13,886 feet yellow and sugar pine lumber.
Oct. 3. To 9,456 feet yellow and sugar pine lumber.
Oct. 4. To 17,492 feet yellow and sugar pine lumber.
Oct. 5. To 10,273 feet yellow and sugar pine lumber.
Oct. 6. To 23,835 feet yellow and sugar pine lumber.
Oct. 7. To 17,395 feet yellow and sugar pine lumber.
Oct. 8. To 6,327 feet yellow and sugar pine lumber.
Oct. 9. To 31,435 feet yellow and sugar pine lumber.
Oct. 10. To 7,884 feet yellow and sugar pine lumber.
Oct. 11. To 17,804 feet yellow and sugar pine lumber.
Oct. 12. To 15,134 feet yellow and sugar pine lumber.
Oct. 13. To 13,218 feet yellow and sugar pine lumber.
Oct. 14. To 61,655 feet yellow and sugar pine lumber.
Oct. 15. To 6,904 feet yellow and sugar pine lumber.
Oct. 16. To 21,310 feet yellow and sugar pine lumber.
Oct. 17. To 39,377 feet yellow and sugar pine lumber.
Oct. 18. To 30,815 feet yellow and sugar pine lumber.
Oct. 19. To 39,647 feet yellow and sugar pine lumber.
Oct. 20. To 17,089 feet yellow and sugar pine lumber.
Oct. 21. To 24,448 feet yellow and sugar pine lumber.
Oct. 22. To 36,368 feet yellow and sugar pine lumber.
Oct. 23. To 32,771 feet yellow and sugar pine lumber.
Oct. 24. To 24,273 feet yellow and sugar pine lumber.
Oct. 25. To 39,819 feet yellow and sugar pine lumber.
Oct. 26. To 10,159 feet yellow and sugar pine lumber.
Oct. 27. To 34,348 feet yellow and sugar pine lumber.
Oct. 28. To 16,846 feet yellow and sugar pine lumber.

Oct. 29. To 12,297 feet yellow and sugar pine lumber.
Oct. 30. To 14,603 feet yellow and sugar pine lumber.
Oct. 31. To 12,250 feet yellow and sugar pine lumber.
1905.
Nov. 1. To 11,156 feet yellow and sugar pine lumber.
Nov. 2. To 41,586 feet yellow and sugar pine lumber.
Nov. 3. To 21,015 feet yellow and sugar pine lumber.
Nov. 4. To 3,670 feet yellow and sugar pine lumber.
Nov. 5. To 6,039 feet yellow and sugar pine lumber.
Nov. 6. To 5,000 feet yellow and sugar pine lumber.
Nov. 7. To 12,162 feet yellow and sugar pine lumber.
Nov. 8. To 3,713 feet yellow and sugar pine lumber.
Nov. 9. To 7,416 feet yellow and sugar pine lumber.
Nov. 10. To 3,576 feet yellow and sugar pine lumber.
Nov. 11. To 8,271 feet yellow and sugar pine lumber.
Nov. 12. To 4,011 feet yellow and sugar pine lumber.
Nov. 14. To 11,063 feet yellow and sugar pine lumber.
Nov. 17. To 13,356 feet yellow and sugar pine lumber.
Nov. 21. To 7,217 feet yellow and sugar pine lumber.
Nov. 22. To 5,001 feet yellow and sugar pine lumber.

Total.....2,779,276, less covering boards, common box and culled lumber to the extent of 482,101 feet, being

2,297,175 feet, at the price or rate, as per contract of $24.00 per thousand.....$55,132.20

ACCOUNT CONTRA.

1905.
June 27. By Cash....$ 489.52
July 10. By Cash.... 107.68
July 12. By Cash.... 161.64

July	24.	By Cash....	145.68	
July	27.	By Cash....	328.04	
July	27.	By Cash....	118.28	
Aug.	4.	By Cash....	5000.00	
Aug.	28.	By Cash....	1748.12	
Sept.	7.	By Cash....	185.39	
Sept.	7.	By Cash....	362.73	
Sept.	11.	By Cash....	278.57	
Sept.	12	By Cash....	7000.00	
Sept.	13.	By Cash....	424.17	
Sept.	20.	By Cash....	190.30	
Sept.	21.	By Cash....	132.75	
Sept.	27.	By Cash....	70.70	
Oct.	4.	By Cash....	167.29	
Oct.	5.	By Cash....	557.05	
Oct.	5.	By Cash....	458.03	
Oct.	5.	By Cash....	42.95	
Oct.	5.	By Cash....	47.25	
Oct.	13.	By Cash....	17.22	
1905.				
Oct.	13.	By Cash....$	438.54	
Oct.	13.	By Cash....	210.44	
Oct.	16.	By Cash....	587.20	
Oct.	17.	By Cash....	94.46	
Dec.	19.	By Cash....	57.53	
Dec.	21.	By Cash....	10,000.00	
1906.				
Jan.	16.	By Cash....$10,000.00		
Mar.	2.	By Cash....$ 5,800.00		$45,221.53
		Total value of lumber sold.....		$55,132.20
		Total amount of payments.....		$45,221.53
		Balance due T. H. Benton.....		$ 9,910.67

Dated November 20th, 1906.

REID & DOZIER,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 21, 1906. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Answer.

Now come the above-named defendants, W. E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and style of W. E. Kelley & Company, and answering to the complaint of the plaintiff in the action above entitled, show to the Court:

I.

Defendants admit the making and entering into of the contract attached to and made a part of plaintiff's complaint, and deny that thereunder or at all plaintiff delivered to the defendants, in the county of Shasta, State of California, or elsewhere, sugar and white pine lumber, or sugar or white pine lumber, of the grade of No. 2 shop and better, to the extent of two million two hundred and ninety-seven thousand one hundred and seventy-five (2,297,175 feet) feet, or any greater or larger amount of lumber, No. 2 shop and better, than one million seven hundred and fifty thousand two hundred and sixty-

eight (1,750,268) feet, and ten thousand four hundred and ninety-three (10,493) feet of shorts.

Defendants further deny that they, or either of them, or anyone for them, received, of and from the plaintiff, under the terms of said contract, or otherwise, two million two hundred and ninety-seven thousand one hundred and seventy-five (2,297,175) feet of California sugar and white pine lumber, of the grade of No. 2 shop and better, or any other or greater amount thereof than one million seven hundred and fifty thousand and two hundred and sixty-eight (1,750,268) feet of No. 2 shop and better, and ten thousand four hundred and ninety-three (10,493) feet of shorts.

II.

Defendants deny that by reason of the sale and delivery of said lumber they became indebted to the plaintiff in the sum of Fifty-five Thousand One Hundred and Thirty-two and Twenty Hundreths Dollars ($55,132.20), in gold coin of the United States, or in any other or greater sum or amount than Forty-two Thousand Three Hundred and Eighty-seven and Ninety-two hundredths Dollars ($42,387.92), which said sum and amount of Forty-two Thousand Three Hundred and Eighty-seven and Ninety-two Hundredths Dollars ($42,387.92), prior to the commencement of this action, was duly paid by these defendants to the said plaintiff in full.

III.

As a counterclaim in favor of these defendants and against the said plaintiff, the defendants allege:

1. That at the time of the commencement of this action, the above-named defendants, W. E. Kelley and Allan H. Daugharty, copartners under the firm name of W. E. Kelley & Company, and each of them, were and still are citizens and residents of the City of Chicago, in the County of Cook, and State of Illinois, and that the above-named plaintiff, T. H. Benton was, at the time of the commencement of this action, and still is a citizen and resident of the County of Shasta, in the State of California.

2. That the amount involved in this counterclaim, inclusive of interest and costs, exceeds Two Thousand Dollars ($2,000).

3. That heretofore, to wit, on the 27th day of May, 1905, the above-named plaintiff and the above-named defendants made and entered into a contract in writing of which the following is a copy:

"Platteau, Shasta Co. Cal. 5/27/05.

"W. E. Kelley & Co.

"901 Chamber Commerce, Chicago, Ill.

"Gentlemen: For and in consideration of One Dollar ($1.00) to me in hand paid, receipt of which I herewith acknowledge, I hereby offer to sell you all the No. two shop and better California Sugar and White Pine that I manufacture at my Saw Mill near Platteau, during the season of 1905.

"All grades mentioned in this contract are the same as per rules adopted Apr. 1st, 1903, by the Cal. Sug. & W. P. Agency.

"All lumber to be delivered at Cottonwood, Cal. and piled in some convenient place near the Southern Pacific R. R. for shipment as directed by you.

"The price of above lumber to be Twenty-four Dollars ($24.00) per M for all grades.

"The terms of payment to be 60 ds from shipment or 2% off for cash (at my option) from face of invoice; cash payments to be made by your San Francisco office drawing sight draft on your Chicago office, and remitting same promptly to Bank of Tehama County, Red Bluff, Cal. for credit in my account.

"The sugar & white pine to be delivered separately; also the several thicknesses of each to be delivered separate.

"In the matter of delivery, my teams will, upon arriving with a load at point of delivery, present your representative with our shipping tally in duplicate, and, if said load arrives in apparent good order, you are to O. K. one copy & return to us. If for any reasons loads appear damaged or short you to make notation of same on tally that is returned to us. This is for our convenience in keeping a check on our teamsters.

"After lumber is delivered at R. R. by us, you are to ship the same within thirty days. As soon as lumber is shipped by you you are to furnish us promptly with a copy of tally showing the number of feet shipped by your men.

"I am to always have the privilege of keeping an inspector on the ground to keep a check on your inspector, if I desire.

"In event of your not shipping any portion of the above lumber within 30 ds. from the time it is rec'd, you are at my request to make an estimate of said

lumber, and make settlement for same as per above terms.

"It is understood that the above settlement, based on estimates, is not to be final, but is subject to adjustment after the final inspection at time of shipment is made by you.

"All lumber is to be delivered by me, dry and in first-class manner.

"All lumber is to be properly edged and otherwise properly manufactured.

"The above proposition does not refer to any stained lumber which I may have; should I have any of such lumber it is subject to further negotiation at the option of both parties.

"All lumber to be manufactured at standard lengths, widths and thicknesses.

"You agree to take all my short clear 5/4, 6/4 and 8/4, 10" over wide 4 ft. & over long or if 6 ft. 8" or over long it may be 5¼ inches & up wide at $20.00 per M at same point of delivery & terms.

"Any Sugar Pine I deliver in excess of 15% of the total cut, you are to pay me three dollars ($3.00) per M extra for.

"All lumber to be manufactured as nearly as possible to your trade requirements as you advise us from time to time, but I reserve the right to not cut anything over 3 inches thick, and not to cut over 50 M. 3" and 100 M 2½" and none over 16 ft. long.

"Yours truly,

"T. H. BENTON.

"Accepted:

"W. E. KELLEY & CO.

"By FRANK W. WARREN."

That under and by virtue of the terms of said contract, the said plaintiff sold and delivered to the above-named defendants, and the above-named defendants received from the said plaintiff lumber as follows:

One million seven hundred and fifty thousand two hundred and sixty-eight (1,750,268) feet of No. 2 shop and better;

Ten thousand four hundred and ninety-three (10,493) feet of shorts;

That by the terms of said contract, the said plaintiff was required to make deliveries of said lumber to the said defendants at their yards, as therein stated; that thereafter the said defendants were required, if possible, to ship said lumber within thirty (30) days from the time it was so delivered at said yards; provided, however, that if the said defendants were unable, from any cause whatsoever; to ship said lumber within thirty (30) days after the same was received, or any part thereof, upon a request from the said plaintiff, the said defendants were required to make an estimate of the said lumber then on hand in said yards, and not shipped, and, based upon said estimate, were required to advance to the said plaintiff a sum of money equal to the value of said lumber so on hand and unshipped, computed upon the prices fixed in said contract; provided, further, that said settlement, based on said estimate, in no event was to be considered as a final settlement, but was subject to an adjustment between the said plaintiff and defendants after a final inspection of said lumber at

the time the same was shipped out of said yards by the said defendants;

That in the month of January, 1906, these defendants had in their yards, as aforesaid, of the lumber delivered there by the said plaintiff, a large quantity of lumber which had not been shipped out, as contemplated by said contract; that said plaintiff, under the terms of said contract, requested that these defendants make an estimate, and, based upon said estimate, make a payment to plaintiff of the lumber so on hand; that thereupon these defendants did make an estimate, and thereafterwards, to wit, on the 12th day of January, 1906, paid to this plaintiff the sum of Twenty Thousand Dollars ($20,000), based on said estimate so made in January, 1906;

That prior to making the above-mentioned payment, these defendants had paid to the said plaintiff for lumber shipped out, Twenty-nine Thousand Three Hundred and Sixty-four Dollars ($29,364); that the total payments for lumber made by these defendants to the said plaintiff, including the payment above mentioned, made upon said estimate, amounted to the sum of Forty-nine Thousand Three Hundred and Sixty-four Dollars ($49,364);

That after said lumber was all shipped out by these defendants under the terms of said contract, it was for the first time ascertained and determined that the total amount of lumber which had been delivered by the said plaintiff, and which had been received by the said defendants, under the terms of said contract, was as follows, viz.:

One million seven hundred and fifty thousand two hundred and sixty-eight (1,750,268) feet of No. 2 shop and better; and

Ten thousand four hundred and sixty-three (10,-463) feet of shorts;

That the total liability incurred by these defendants by reason thereof to the said plaintiff amounted to and was the sum of Forty-two Thousand Three Hundred and Eighty-seven and Ninety-two hundredths Dollars ($42,387.92).

That under and by the terms of said contract above set forth, it was also provided that the defendants were allowed sixty (60) days' time, from the date lumber was shipped out of the yards of said defendants, in which to make payment for said lumber so shipped, with a deduction of two per cent (2%) off for cash payments, without taking the sixty (60) days time allowed for making said payments; that these defendants made payment for said lumber at such times and in such amounts as entitled defendants, under the terms of said contract, to a deduction of two per cent (2%) off for cash, in the sum of Six Hundred and One and Nine-hundredths Dollars ($601.09), which said sum and amount these defendants were and still are entitled to receive of and from the said plaintiff by reason thereof;

That by reason of making the payment, based upon the estimate as aforesaid, these defendants overpaid the said plaintiff, on account of said lumber so delivered by the said plaintiff and received by the said defendant, in excess of the amount actually due and owing by the defendants to the said plaintiff for lum-

ber under the terms of said contract, the sum of Six Thousand Nine Hundred and Seventy-six and Eight-hundredths Dollars ($6,976.08); that said sum of Six Thousand Nine Hundred and Seventy-six and Eight-hundredths Dollars ($6,976.08) was paid by these defendants to the said plaintiff by mistake, believing at the time the same was so paid, that the indebtedness that would be due by these defendants to the said plaintiff would amount to said sum, the sum being paid under the terms of said contract; and that the same was subject to adjustment after the final inspection of said lumber at the time shipment was made; that by reason thereof these defendants are entitled to have said sum repaid to them by the said plaintiff;

That, in the manner aforesaid, the plaintiff became and is owing and indebted to these defendants in the sum of Six Hundred and One and Nine-hundredths Dollars ($601.09), and Six Thousand Nine Hundred and Seventy-six and Eight-hundredths Dollars ($6,976.08), in all the sum of Seven Thousand Five Hundred and Seventy-seven and Seventeen-hundredths Dollars ($7,577.17), with interest thereupon from the 12th day of January, 1906, at the rate of seven per cent (7%) per annum; that no part nor portion of said sum of Seven Thousand Five Hundred and Seventy-seven and Seventeen-hundredths Dollars ($7,577.17), and interest, has been paid by said plaintiff to these defendants.

Wherefore, these defendants demand that they have judgment against the said plaintiff for the said sum of Seven Thousand Five Hundred and Seventy-

seven and Seventeen-hundredths Dollars ($7,577.17), together with interest thereon from the 12th day of January, 1906, at the rate of seven per cent per annum, together with their costs and disbursements in this action.

BURKE CORBET,
Attorney for Defendants.

State of California,
City and County of San Francisco,—ss.

Burke Corbet, being first duly sworn according to law, deposes and says: That he is the attorney for the defendants in the above-entitled action; that he has read the foregoing Answer, and knows the contents thereof; that the facts therein stated are true and correct of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; that this verification is not made by one of the defendants to the action above entitled for the reason that both of said defendants are absent from the City and County of San Francisco, State of California, where this deponent resides.

BURKE CORBET.

Subscribed and sworn to before me, this 25 day of February, A. D. 1907.

[Seal] EDITH W. BURNHAM,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within answer is hereby admitted this 27 day of February, A. D. 1907.

REID & DOZIER,
Attorneys for Plaintiff.

[Endorsed]: Filed Feby. 27, 1907. Southard Hoffman, Clerk.

At a stated term, to wit, the March term, A. D. 1907, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 4th day of March, in the year of our Lord one thousand nine hundred and seven. Present; The Honorable JOHN J. DE HAVEN, District Judge.

No. 13,907.

T. H. BENTON,

vs.

WM. E. KELLEY et al.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein came on this day to be heard and the same being submitted to the Court for consideration and decision, it is ordered that said demurrer be and the same hereby is overruled. Further ordered, this cause be placed on the general trial Calendar, and the same hereby is continued for the term.

In the Circuit Court of the United States, Northern District of California.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY & CO.,

Defendants.

Stipulation [Waiving Trial by Jury, etc.].

It is hereby stipulated, by and between the plaintiff and the defendants in the action above entitled, that said cause be tried to the Court, and that a Jury therein be, and it is hereby waived by each of the parties hereto.

Dated March 25, 1907.

REID & DOZIER,
Attorneys for Plaintiff.
BURKE CORBET,
Attorney for Defendants.

[Endorsed]: Filed April 10th, 1907. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

At a stated term, to wit, the March term, A. D. 1907, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Thursday, the 27th day of June, in the year of our Lord one thousand nine hundred and seven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,907.

T. H. BENTON

vs.

WILLIAM E. KELLEY, et al.

Order for Findings and Judgment.

The parties hereto and their respective attorneys being present as on yesterday, the trial hereof was thereupon resumed. Upon request of Mr. Dozier it was stipulated by Mr. Corbet that the usual stipulation be entered as to taxing reporters' fees for per diems and costs of transcripts. Thereupon the case was argued by Mr. Thos. B. Dozier on behalf of plaintiff and by Mr. Burke Corbet on behalf of defendants and submitted to the Court for consideration and decision, and the same being fully considered by the Court it is ordered that findings be filed in accordance with the rules of this Court and that judgment be entered thereon in favor of plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Present.—Hon. WM. C. VAN FLEET, Presiding.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Decision [on Merits].

This cause heretofore came on regularly for trial before the Court without a jury, a jury trial having been duly waived by the parties, and Messrs. Reid & Dozier appearing as attorneys for plaintiff, and Messrs. Burke Corbet and J. R. Selby appearing as attorneys for defendants, and from the evidence introduced the Court finds the facts as follows, to wit:

Findings of Fact.

1. That on May 27th, 1905, plaintiff and defendant entered into the contract which is set forth and attached to the complaint; that after the making of said contract, and its partial performance, the place of delivery of lumber by plaintiff was changed by the consent of plaintiff and defendants from Cottonwood, California, to Anderson, California.

2. That in pursuance to the terms of said contract plaintiff delivered at Anderson, California, and at Cottonwood, California, 2,779,276 feet of lumber in gross; that said lumber was delivered at various times between June 5th, 1905, and November 22, 1905, the first delivery by plaintiff being made June 6th and the last November 22d; that said lumber was delivered by plaintiff at places designated by defendants, in accordance with the terms of the contract; that of said total amount delivered by plaintiff, there was a large amount of lumber of a grade below that No. 2 shop and better, California sugar and white pine; that said lumber was not sorted so that the lumber of a quality of No. 2 shop or better was separate from that of inferior quality at the time said lumber was delivered by plaintiff and unloaded at the places designated by defendants.

3. That defendants have shipped, of the lumber delivered by plaintiff at Anderson and Cottonwood, 1,774,648 feet of No. 2 shop and better lumber, according to the contract, of which 1,741,999 feet was loaded on railroad cars at points named, and shipped by defendants, and of which 32,649 feet was delivered by defendants from their yards to a planing mill; that said 1,744,648 feet of lumber shipped out by defendants, was graded as provided by said contract, at the time of shipment, as herein stated; that defendants also caused all the lumber delivered by plaintiff to them, to wit, 2,779,276 feet, to be graded as provided by said contract at the various times lumber was shipped by them, as hereinbefore stated, at the time of each shipment; that a large amount of the

lumber delivered by plaintiff to defendants was rejected by defendant, as not being No. 2 shop or better, and was piled separately from the lumber not yet graded; that, of the lumber so rejected, plaintiff sold, to wit, 19,000 feet to one Cunningham prior to November 9th, 1905, and also sold a large number of feet to one F. W. Warren that in pursuance to the terms of the contract, as made May 27th, 1905, defendants have shipped all the No. 2 shop or better lumber which plaintiff delivered to them at Anderson and Underwood; that the total amount so shipped by defendants was, as hereinbefore stated, 1,774,648 feet; that the first shipment of lumber by defendants was on June 24th, 1905; that the last shipment of lumber by defendants, as aforesaid, was in March, 1907; that defendants have paid plaintiff for lumber sold to them under the terms of the contract made May 27th, 1905, subsequently modified, as hereinbefore set forth, Forty-five Thousand One Hundred and Sixty-four Dollars ($45,164); that Twenty-nine Thousand Three Hundred and Sixty-four Dollars ($29,364) of this amount was paid at such times as to entitle defendants to a discount of two per cent (2%) under the terms of the contract, and plaintiff allowed defendants such discount; that the total credit to which defendants are entitled is Forty-five Thousand Seven Hundred and Sixty-five and Nine-Hundredths Dollars ($45,765.09), being cash as stated, and a discount of Six Hundred and One and Nine-Hundredths Dollars ($601.09).

4. That on or about December 20th, 1905, it was orally agreed by plaintiff and defendants that a final

determination and settlement of the amount and grades of lumber delivered by plaintiff to defendants, and the amount of indebtedness of defendants to plaintiff, be made, and when so determined the sum should be paid by defendants to plaintiff; that the said determination was based and was to be based on estimates of two appraisers, one appointed by plaintiff and one by defendants, in case they could agree as to the amount of No. 2 shop and better lumber then at Cottonwood in the yard known as the yard of Kelley & Company, delivered by plaintiff; that in pursuance to such oral agreement, one Clifton was orally appointed by defendants, and one Ruff was orally appointed by plaintiff, as appraisers, and on January 11th and 12th, 1906, said Clifton and Ruff made a report, after examination of the lumber delivered by plaintiff to defendants, then at Cottonwood, California, at the place where said plaintiff had been directed to deliver said lumber by said defendants.

5. That by said report and agreement of said Clifton and Ruff, it was determined that plaintiff had delivered to defendants 2,675,219 feet of lumber of various kinds; that of the lumber then at Cottonwood, at the time of the report, January 12th, 1906, 449,314 feet was of lower grade than that called for by the contract, and that the total amount of No. 2 shop or better lumber, as called for by the contract, which had been delivered by said plaintiff to said defendants, was 2,225,965, and said Clifton accepted this determination as correct for defendants, and said Ruff accepted the same as correct for plaintiff;

that said determination was in writing, and was evidenced by two separate sheets of paper made in duplicate; one dated January 11th, 1906, purporting to be the estimate of lumber below the grades called for by the contract, then at Cottonwood, California; the other dated January 12th, 1906, purporting to be a summary and recapitulation of the total amount of lumber delivered under the contract, and the total amount of lumber, No. 2 shop and better; that it was settled and agreed by plaintiff and defendants, by the facts hereinbefore in this paragraph stated, that plaintiff had delivered to defendants 2,225,905 feet of lumber of the grade No. 2 shop or better, according to the contract, and defendants acknowledged that such number of feet was correct, and the same was agreed to by defendants as the amount of lumber for which they were liable to pay, after deducting the just credits to which they were entitled.

6. That defendants, on and after January 12th, 1906, were, by virtue of said estimate or determination, pursuant to said agreement of December 20, 1905, liable to pay plaintiff for 2,225,905 feet of lumber at the rate of Twenty-four Dollars ($24) per thousand, amounting to Fifty-three Thousand Four Hundred and Twenty-one and Seventy-two Hundredths Dollars ($53,421.72); that defendants are entitled to credits of Forty-five Thousand Seven Hundred and Sixty-five and Nine Hundredths Dollars ($45,765.09); that the defendants have never fully performed said agreement of December 20th, 1905, and have paid plaintiff no moneys pursuant to the said agreement.

Conclusions of Law.

As a conclusion of law, from the foregoing facts, the Court finds:

That plaintiff is entitled to judgment against defendants, W. E. Kelley and Allan H. Daugharty, as copartners, for the sum of Seven Thousand Six Hundred and Fifty-six and Sixty-three Hundredths Dollars ($7,656.63), and interest thereon from June 5th, 1906, and costs of suit.

Let judgment be entered accordingly.

Signed this 28th day of September, 1908, at San Francisco, California.

W. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sept. 28, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

At a stated term, to wit, the July term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 28th day of September, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,907.

T. H. BENTON

vs.

WILLIAM E. KELLEY et al.

Order for Judgment.

In this cause it is ordered, in accordance with the opinion of the Court heretofore rendered and the findings of fact and conclusions of law this day filed, that judgment be entered in favor of plaintiff and against the defendants in the sum of $7,656.63, as principal and interest thereon from June 5, 1906, and for costs.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Judgment on Findings.

This cause having come on regularly for trial upon the 25th day of June, 1907, being a day in the March, 1907, term of said court, before the Court, sitting without a jury, a trial by jury having been duly waived by stipulation filed; Thomas B. Dozier, Esq., having appeared as attorney for plaintiff and Burke Corbet and J. R. Selby, Esqs., having appeared as attorneys for the defendants and the trial having

been proceeded with upon the 26th and 27th days of June in said year and term, and oral and documentary evidence in behalf of the respective parties having been introduced and the evidence having been closed and the cause having after argument by the attorneys for the respective parties been submitted to the Court for consideration and decision and the Court, after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith and for costs;

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that T. H. Benton, plaintiff, do have and recover of and from W. E. Kelley and Allan H. Daugharty, copartners doing business under the firm name and style of W. E. Kelley & Company, defendants, the sum of eight thousand eight hundred ninety-six and 79/100 ($8,896.79), together with his costs in this behalf expended taxed at $

Judgment entered September 28, 1908.

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: Filed Sept. 28, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 13,907.

T. H. BENTON

vs.

WILLIAM E. KELLEY et al.

Certificate to Judgment-Roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 28th day of Sept., 1908.

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed Sept. 28, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Hon. W. C. VAN FLEET, Judge.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Bill of Exceptions.

In this cause a trial by jury was waived by stipulation in writing, signed by counsel for plaintiff and counsel for defendants, and filed in the cause April 10th, 1907, and said stipulation was duly entitled in this court and case, and was as follows:

"It is hereby stipulated, by and between the plaintiff and the defendants in the action above entitled, that said cause be tried by the Court, and that a jury therein be and it is hereby waived by each of the parties thereto.

Dated, March 25th, 1907.

"REID & DOZIER,
"Attorneys for Plaintiff.
"BURKE CORBET,
"Attorney for Defendants."

Thereafter the cause came duly on for hearing before the Court sitting without a jury, on June 25th, 1907, Hon. W. C. Van Fleet presiding; the plaintiff appearing by Messrs. Reid & Dozier as attorneys, and the defendants by Burke Corbet, their attorney.

Whereupon, in behalf of the plaintiff, evidence was introduced consisting of the testimony of witnesses, T. H. Benton, the plaintiff, Kate E. Benton, and B. C. Clifton, and Plaintiff's Exhibits "A," "B," and "C." The object of said evidence was to show that the plaintiff had delivered 2,779,276 feet of lumber in gross, at the yards at Anderson and Cottonwood, at the places designated by the defendants.

Whereupon witnesses were sworn, evidence was introduced, objections were made to the introduction of evidence, motions were made by counsel for the respective parties, rulings were made upon the motions by the Court, exceptions taken, as hereinafter set out, on the subject of a settlement or determination made on or about December 14th, 1905, and a determination or award made in pursuance thereof, represented by Plaintiff's Exhibits "D" and "E."

The following is all of the evidence on which paragraphs IV and V and VI of the Findings of Fact are based:

Witnesses for plaintiff testified as follows:

[Testimony of T. H. Benton, for Plaintiff.]

T. H. BENTON, the plaintiff, called on behalf of the plaintiff:

Mr. DOZIER.—Q. Mr. Benton, did you have a settlement of any kind with Kelley & Company concerning the lumber which you delivered in 1905 under the terms of this contract?

A. I thought I did.

Q. I ask you, did you?

Mr. CORBET.—I object to the question as immaterial and incompetent, as it is not embraced within the pleadings. There is no settlement pleaded anywhere in the pleadings.

Mr. DOZIER.—The purpose is to show that the amount of lumber delivered and the full price to be paid therefor were included in such a settlement, and that subject matter is certainly embraced within the pleadings. We allege that he delivered so much lumber, of such value, on which so much was paid, and so much is due. We are asking it for the purpose of determining that question.

The COURT.—I think that is entirely proper, if it has a tendency to sustain the allegations of the pleadings.

Mr. CORBET.—We take an exception.

Mr. DOZIER.—Q. I ask you, did you have a settlement with Kelley & Company relative to this lumber? A. I did.

Q. When and where, and who were present, and with whom was the settlement?

(Testimony of T. H. Benton.)

A. The settlement was made with Mr. Daugharty, I believe.

Q. One of the copartners of Kelley & Company?

A. Yes, sir.

Q. Mr. Allan H. Daugherty? A. Yes, sir.

Q. Where was it made?

A. In their office at Anderson.

Q. Who was present?

A. Mr. A. F. Smith, Mr. John R. Lowden, myself, Mr. Warren, Mr. Daugherty, and there were others in the office—I do not call to mind their names; a lady there.

Mr. CORBET.—He has not answered the question fully.

Mr. DOZIER.—Q. When was the settlement, or about when?

A. I could not say positively about the settlement, when it was.

Q. You can say approximately, can you not?

A. It was, I think, along about the 14th of December, I should judge.

The COURT.—Q. Of what year?

A. Of 1905.

Mr. DOZIER.—Q. Of the year in which the cut of lumber was made? A. Yes, sir.

Q. Have you the data in relation to that settlement? A. Yes, sir, we have.

Q. Any papers that were entered into or signed at that time? A. Yes, sir.

Q. I now show you two documents and ask you if you can identify them? A. Yes, sir.

(Testimony of T. H. Benton.)

Q. What are they?

A. They are an estimate—

Mr. CORBET.—(Intg.) I object to the question as incompetent, if your Honor please. The documents themselves are the best evidence of what they are.

Mr. DOZIER.—The purpose is not to get the contents in, if your Honor please.

The COURT.—He means to ask him to state what they purport to represent.

Mr. DOZIER.—Yes, what they purport to represent, your Honor.

A. They are percentages of grades of lumber and the amount of lumber as scaled by their men, in order to get a settlement. They had gone to work and graded the number 2 shop lumber into 3 shop and into common lumber, and we got into a discussion in regard to the grades, so Mr. Daugharty proposed to pick a man and have me pick a man, and put them on those piles of lumber, and let them go through them until they were satisfied with the percentages of the different grades that there were in the piles—the percentages of 2 shop better that was in the common lumber. So Mr. Clifton went through the pile for them, and Mr. Ruff went through the lumber for me, in order to get a basis for a settlement, and those are the papers showing what the settlement was.

Q. As to the amount of lumber, regardless of the grades now, what was done, and what do those papers purport to be, or either one of them—as to the

(Testimony of T. H. Benton.)

amount of lumber actually delivered to Kelley & Company under the terms of this contract by you?

A. The amount of the—

Q. (Intg.) I am not asking for it now, but do those papers refer to that amount of lumber?

A. Those papers refer to an amount of lumber as taken by Mr. Smith, an estimate of their yard by Mr. Smith—

Q. Who was Mr. Smith?

A. Mr. Smith was one of their graders.

Q. Mr. W. F. Smith? A. W. F. Smith.

Q. They refer, then, to the amount of lumber delivered by you under the terms of the contract?

A. Yes, sir.

Q. And the various grades of lumber as delivered under the terms of the contract? A. Yes, sir.

Q. These papers came up in a settlement with Mr. Daugharty, you say. But prior to that time was there any arrangement for this settlement, and if so, with whom, and between whom?

A. An arrangement was made, in the first place it was made by, or I talked to Mr. Kelly about it.

Q. Just state what occurred in relation to this matter?

A. I was dissatisfied with the grades. I went down to where they were grading the lumber, and I found they were putting the 2 shop lumber into the common lumber, into the common pile, and I complained to Mr. Warren, and also to Mr. Clifton, and we talked about it a good deal, and finally Mr. Kelley came along, and I met Mr. Kelley and I talked to him

(Testimony of T. H. Benton.)

about it, and Mr. Kelley told me he would have the matter adjusted satisfactory to me, and he would settle up with me. The payments were past due, and the lumber should have been shipped and was not shipped, and I wanted my money, and he told me that he would have it adjusted just as soon as he possibly could and pay me my money. Shortly after that, Mr. Daugharty came out, and he proposed the line of settlement himself, in regard to the settlement, and I supposed after we had got that made, it was all settled, and as the amount of the estimate by Mr. Smith was a little less than our total, why, I accepted it any way, and, as I supposed, a settlement was reached.

Q. Mr. Benton, you say that all of the lumber which you did at all deliver was delivered at the time of this arrangement was it?

The COURT.—You mean that it had been delivered prior thereto.

Mr. DOZIER.—Q. (Contg.) Had been delivered prior thereto, yes. A. Yes, sir.

Q. All of the lumber which you intended to deliver under the terms of the contract had been actually delivered? A. Yes, sir.

Q. After that time, you paid no attention to the grading or scaling? A. I did not.

Q. What character of lumber were you shipping, actually shipping to Kelley & Company?

The COURT.—When?

Mr. DOZIER.—Q. (Contg.) In 1905, under the terms of this contract.

(Testimony of T. H. Benton.)

Mr. CORBET.—The contract is the best evidence and speaks for itself, and specifies what grades of lumber they bought.

The COURT.—They might not have complied with the contract.

Mr. DOZIER.—That is exactly what they are denying, your Honor, in this case.

The COURT.—The contract would not be the best evidence of what they did. It would be the best evidence of what they should have done.

A. We shipped 2 shop and better as near as we could without putting a grade on it.

Mr. DOZIER.—Q. In shipping the 2 shop and better, some other characters of lumber get in, do they? A. Yes, sir.

Q. After Kelley & Company had been shipping by Agreement, that ceased for a time, did it not?

A. Yes, sir.

The COURT.—What ceased for a time?

Mr. DOZIER.—The shipping—after they had been doing so, the shipment of lumber by carload ceased for quite a while—did it not, Mr. Benton?

A. I don't know that it ceased.

Q. I will ask you, then, you were getting returns of lumber shipped, were you? A. Yes, sir.

Q. And upon the discovery, as you claim, that No. 2 shop lumber was being graded into No. 3 shop and common, then it was this first discussion came up with Mr. Kelley, one of the members of the firm, and subsequently came the settlement with Mr. Daugharty, the other member of the firm?

(Testimony of T. H. Benton.)

A. Yes, sir.

Q. Do you know who made these figures, and whose signatures these are of your own knowledge? Do you know the signatures?

A. I think I do. I didn't see them made.

Q. And you know the writing, Mr. Benton? You are acquainted with handwritings, are you not?

A. I think I do know it.

Q. In relation to the signatures, whose signature is this?

A. This is Mr. Clifton's—"W. E. Kelley & Company, by Clifton," and this is Mr. Ruff's, "T. H. Benton, by Ruff."

Mr. DOZIER.—Now, if your Honor please, I offer in evidence first a statement signed by W. E. Kelley & Company by Clifton, as to the amount of lumber shipped under this contract—or rather delivered under the contract, to Kelley & Company.

The COURT.—I do not understand quite the drift of your questions in regard to that.

Mr. DOZIER.—My questions to Mr. Benton, your Honor, have gone to both documents, but I am now taking them up seriatim, in order to make the matter a little plainer and more logical, that is all. The two documents go together.

Mr. CORBET.—I desire to examine the witness for the purpose of laying a foundation for an objection, if your honor please.

Q. Are these the documents that you refer to as having been embraced in that so-called settlement that you made?

(Testimony of T. H. Benton.)

A. Those were made after the agreement between Mr. Daugharty and myself.

Q. Then this is something that took place after that alleged settlement?

A. That is what we agreed on.

The COURT.—Q. This was in pursuance of that settlement? A. Yes, sir.

Mr. CORBET.—Q. And the alleged settlement was that the lumber in the yard should be graded at that time, and this is the outgrowth of that agreement to have the lumber graded in the yard?

A. The agreement was that they were to go through the piles, and if they were satisfied, they were to agree on the percentage of 2 shop and better that was in the common lumber, in order to get at a basis to settle on.

Q. That settlement was made pursuant to an arrangement that you had with Mr. Daugharty, you say? A. Mr. Daugharty.

Q. And Mr. Warren? A. Mr. Daugharty.

Q. Representing W. E. Kelley & Company?

A. Yes, sir.

Mr. CORBET.—We object to the offer as incompetent, irrelevant and immaterial, for the reason that the cause of action of the plaintiff is predicated upon a writtten agreement which speaks for itself, in that it provides that the lumber shall be graded as shipped, and then as shipped, it shall be paid for, and this is incompetent under the pleadings.

The COURT.—Let me see the paper. (The Court examines the paper.)

(Testimony of T. H. Benton.)

Mr. CORBET.—May I examine the other one while his Honor is examining this paper.

Mr. DOZIER.—Yes, certainly.

The COURT.—I wish you would read that. I can't make out very well, because of the matter in which it is made—I can't tell the sequence in which it should be read.

Mr. DOZIER.—(Reading.)

"Anderson, Jan. 12, 1906.

"According to statement of Nov. 9, 1905, made out by Mr. William Smith in behalf of Kelley & Co., Mr. Benton delivered to W. E. Kelley's yard in Anderson, Cal., Lumber as follows, in total: 2,675,219 ft., box lumber, shop and better, including lumber mentioned below.

In this amount"—that being the total lumber received in the yard—

"in this amount is contained 320,327 ft. common
"in this amount is contained 66,637 ft. box.
"in this amount is contained 29,082 ft. cull.

410,046 ft. total
2,675,219 ft.
less 416,046 ft. Com. cull & box

will leave 2,259,173 ft.' #2 shop & better

Note: Roofing boards, and also lumber hauled by Stiff and Dewlaney is not included in above amounts, and goes separate.

(Testimony of T. H. Benton.)

The 66,637 ft. of box were sent down by Mr. Benton as box Lumber.

This statement is accepted as correct.

W. E. KELLEY &CO.

B. CLIFTON."

In other words, the lumber which came from Mr. Benton's yard, the entire amount delivered was 2,675,219 ft., less 416,046 feet, which were not included in the contract, and which was common lumber, box lumber, or cull lumber.

* * * * * * * * *

The COURT.—The paper will be admitted.

(The paper is marked Plaintiff's Exhibit "D.")

Mr. CORBET.—If your Honor recalls, I noted an exception to the introduction of the paper.

The COURT.—Yes.

Mr. CORBET.—I understand your Honor now overrules the objection.

The COURT.—I have admitted the paper, and you have your exception. That is always the case; when you take your exception it is always noted.

Mr. DOZIER.—Now, if your Honor please, I am going to offer the other paper, if your Honor will examine it.

(The Court examines the paper in question.)

Mr. DOZIER.—Q. This is the paper, Mr. Benton, which you identified as being a determination of the grades delivered? A. Yes, sir.

Mr. DOZIER.—I now desire to offer in evidence this paper dated at Anderson, California, January 11, 1906.

(Testimony of T. H. Benton.)

Mr. DOZIER.—(Reading:)

"Anderson, Cal., Jan. 11, 1906.

All 5/4, 6/4, 8/4, etc., common white and sugar pine 504,205 ft. Percentage graded out of this as follows:

24,083% Shop or 121,427 ft. in the 504,205 ft.
5,768% Cull or 29,082 ft. in the 504,205 ft.

Total cull and shop 150,509

504,205 ft. less 150,509 353,696 ft. common

All 5/4 6/4 8/4 etc. #3 shop white and sugar pine 389,694 ft.

Percentage of common graded out of this as follows:

8,537% common or 33,268 ft. in 389,694 ft. #3 shop or:

Common out of common.....320,327
Box from mill..... 66,637
Cull out of common..... 29,082 ft."
Common out of common #3 shop..... 33,268

416,046 ft.

Changes made by mutual consent.

Above statement accepted as correct. For T. H. Benton, Jos. Ruff.

W. E. KELLEY & CO.,
B. CLIFTON."

We will ask that this be admitted in evidence, your Honor, and marked as Plaintiff's Exhibit "E."

Mr. CORBET.—To which the defendant objects upon the ground that it is incompetent and irrelevant under the pleadings.

(Testimony of T. H. Benton.)

The COURT.—The objection is overruled.

Mr. CORBET.—We take an exception.

(The paper is marked Plaintiff's Exhibit "E.")

Mr. DOZIER.—Q. These documents, Mr. Benton, were executed and delivered to you in pursuance of the agreement entered into between you and Mr. Daugharty at the time of the settlement?

A. They were.

Q. And upon the basis of that, from that day to this you had nothing more to do with the transaction so far as grading and culling and measuring the lumber is concerned? A. I did not.

Q. At that time there was a large quantity of lumber, was there not, in the yard at Anderson?

A. Yes, sir.

On Cross-examination.

Mr. CORBET.—Q. You have testified, I believe, that there was a settlement made between Mr. Daugharty on behalf of the defendants and yourself along in December, 1905. Was that a settlement, Mr. Benton, or was it merely for the purpose of arriving at what they possibly would be owing you under the contract, based upon the contract itself, for the reason that the lumber had not all been shipped out?

A. I understood it to be a settlement, and I understood it to be an understanding for these parties to make an estimate so that Kelley & Company could finish paying me what they owed me. They had not shipped out the lumber.

(Testimony of T. H. Benton.)

* * * * * * * * *

Q. Is it not a fact that the settlement which you have testified to as having been made in December, 1905, was nothing more nor less than placing an estimate upon the lumber still remaining in the yard that had not been shipped out, in compliance with this portion of the contract: "In the event of your not shipping any portion of the above lumber within 30 days from the time it is received, you are, at my request, to make an estimate of said lumber and make settlement for same, as per above terms. It is understood that the above settlement, based on estimates, is not to be final, but is subject to adjustment after the final inspection at the time shipment is made by you."

A. No, sir, it was to be a final settlement. Mr. Kelley promised me a final settlement.

Q. Did you ever make a demand on them for such an estimate of the lumber on hand?

A. Such an estimate?

Q. Yes, as estimate of the lumber on hand, for the purpose of making payments to you?

The COURT.—An estimate of the lumber on hand that had not been shipped out, and on which you desired them to advance payment. A. Yes, sir.

Mr. CORBET.—Q. Then you say that this settlement that you referred to was not made pursuant to the terms of the contract in the particulars I have referred to?

A. No, sir, it was made for a final settlement. Mr. Kelley promised me a final settlement.

(Testimony of T. H. Benton.)

* * * * * * * * *

Mr. CORBET.—Q. Mr. Benton, there has been introduced in evidence here Plaintiff's Exhibit "D," which claims to show 2,675,291 feet. Do you know where that statement was procured from?

A. Mr. Clifton.

Q. You say you received that from Mr. Clifton?

A. Yes, sir.

Q. Do you know when it was received from Mr. Clifton?

A. I think I was sick at the time that came, that Mr. Clifton sent it up at a time when I was in bed sick.

Q. If it did not come from Mr. Clifton, where did it come from? Have you any idea?

A. I have not.

Q. It is based on that statement that you claim the total amount of the lumber delivered down at Cottonwood and Anderson, is it not?

A. I think so.

The COURT.—How is that?

Mr. CORBET.—His claim is based on that statement, where they say that the total amount was 2,675,291, that that amount had been shipped out prior to Nov. 9, 1905, and then they go ahead and make an estimate based on some figures made by Ruff and Clifton. I am asking him what he based that data upon, that figure of 2,675,000 feet of lumber, and if he bases his claim that that is the total amount of lumber delivered on those figures.

(Testimony of T. H. Benton.)

A. That claim was made and the estimate made, I think, by Billy Smith, about the 9th of November, and after the 9th of November I think we delivered in a little lumber, I don't know how much, but some lumber after that time.

Q. Based upon an estimate made by William Smith? A. Yes, sir.

Q. Is that gentleman in the courtroom here?

A. No, sir.

Q. Is Mr. William Smith here?

A. No, sir, he is not here. The train hasn't got in yet, and he isn't here.

Mr. DOZIER.—He will be here when the Oregon Express arrives.

Mr. CORBET.—Q. Aside from the fact that you got it from Mr. Smith, you don't know where it comes from. That is all.

Redirect Examination.

Mr. DOZIER.—Q. Mr. Benton, will you kindly tell the Court how it came about that you made a final settlement of this matter with Mr. Daugharty, or with Kelley & Company, of the lumber delivered to them, rather than a tentative settlement? What were the circumstances that led up to it and why did you do it?

A. Well, my lumber was delivered, I had it all delivered to them in the yard, and they had not graded it out, and could not get it graded out properly, and I went down there and I found that they were grading 2 shop and better into the box and cull, and the lumber was liable to be damaged, and I

(Testimony of T. H. Benton.)

needed the money, and I insisted on a settlement. They could not live up to the contract, had not lived up to it and could not do it, and I wanted a settlement. I needed my money, and when Mr. Kelley came out, I spoke to him about it, and Mr. Kelley promised me a settlement, told me he would have it attended to and settle up with me, and pay me in full for my lumber. He said he did not want our lumber in his yard, it ought to have been settled for, he admitted their system was wrong, and that they *had into* a mix-up, and he could not straighten it out right then, but he would do the best he could, and have it straightened out as soon as he could, and pay me for the lumber. On the heels of that, Mr. Daugharty came out and we talked it over, and he proposed the method of settlement himself, I think.

Q. And what was the method of settlement?

A. That method of settlement was for him to take a grader and for me to pick one, and for them to go into the pile of the low grades of lumber, the upper grades there was no dispute about, but it was the common and box and the 3 shop that the dispute was about, and we proposed—

Q. (Intg.) Mr. Benton, I wish you would let his Honor understand that there was no dispute about the upper grades of lumber. Do you mean that the lumber was piled in the yards and designated as certain classes of lumber?

A. Yes, sir.

Q. And that designated as 2 shop and better in their yard, there was no dispute about?

(Testimony of T. H. Benton.)

A. Yes, sir.

Q. But the inferior grades you disputed?

A. Yes, sir.

Q. Now, go on.

A. He proposed that they take a man and I take one to go through those lower grades of lumber and get a percentage of the high grades of lumber that were in those piles.

The COURT.—Q. You claimed that there was lumber in those low grade piles that should be classed or graded as 2 shop and better? A. Yes, sir.

Mr. DOZIER.—Q. And they had segregated this out as cull and box?

A. They had segregated it out as 3 shop—that was a grade they made of their own, there was no such grade as 3 shop in our grades—they made a grade of 3 shop of their own, and that was lower than 2 shop, and I claimed that there was lumber that ought to be put in the higher grade of 2 shop or better, and he proposed to pick a man and that I should pick one, and that they should go through and determine the percentage of the higher grades of lumber in those piles, and if they could not agree on that, they would lay it out, and if they laid it out to amount to anything, they would pick another man and go through it and determine what there was, and the third man should be final. If they didn't lay out a great amount, why, he said, he would pay for it —that it was not worth quarreling about, and he would not fool with it, but would take it and pay for

(Testimony of T. H. Benton.)

it. And that as soon as this was done, he would pay me for my lumber.

Q. Now, will you kindly explain to his Honor about this feetage here given in what you call the Billy Smith scale or estimate of lumber, why it is not the total amount for which you brought action. This was the amount of lumber, you said, delivered up to November 9th. You subsequently delivered more lumber, did you?

A. This was an estimate that Mr. Clifton and Mr. Ruff took that Billy Smith had made. Billy Smith had made this estimate at the request of Mr. Clifton, and it had come near up to my scale, what we claimed, and it was spoken of that day and said that the Smith estimate was not disputed; that it was so near my own account that we would call that correct.

Q. And what was said in relation to the estimate as made before by the Kelley Company or for the Kelley Company?

A. It was too light—the scale they had before was, I think, nearly a million feet below mine.

Q. Nearly a million feet below?

A. Yes, sir.

The COURT.—Q. That is, nearly a million feet below the grades that the contract called for?

A. No, sir, below the scale that I had delivered.

Q. It was below the scale you had delivered in supposed compliance with the contract?

A. Yes, sir.

Mr. DOZIER.—No, of all the lumber delivered, your Honor.

(Testimony of T. H. Benton.)

The COURT.—I understand that—of all the lumber delivered.

Mr. DOZIER.—Yes, your Honor.

Q. At the time that this other paper was signed and the grading was done, you had delivered more lumber than is called for in that paper?

A. Yes, sir, I had delivered more lumber. That is, there was lumber came in after Billy Smith made the estimate.

Q. In other words, you delivered the difference between what is in the Smith estimate and the amount stated in your complaint, subsequent to the 9th day of November, 1905.

A. Yes, sir.

Q. Whatever that may be? A. Yes, sir.

Q. Now, Mr. Benton, this settlement called for an arbitration, that is to say, you were to have one inspector, the defendants another, and if those two could not agree, those two or you two would select a third, and the judgment of the third one would be final?

A. Those two were to select a third.

Q. Was any matter ever brought up to you about that in dispute afterwards, or did you abide by the settlement of the two?

A. Immediately after, or about the time this settlement was taking place, I was taken down with pneumonia fever, and was confined to my house for six weeks, and I paid no attention to it, and supposed that the settlement was all over, and as soon as I got

(Testimony of T. H. Benton.)

out and was able to do business at all, I would get my money for my lumber.

Q. Mr. Corbet has asked you in relation to the shipping—not the shipping receipts, but the shipping estimates—

Mr. CORBET.—The tally sheets.

Mr. DOZIER.—Q. (Contg.) The tally sheets, whatever they may be. Did you not receive them from Kelley & Company after this action was brought? A. Yes, sir, I think we did.

Q. Did not a lot of them come in a bunch, a whole bunch of them together?

A. I could not say. I could not say how they came, because I paid no attention to them after this settlement. In fact, I didn't pay much attention to them, any way. My wife was bookkeeper, and whenever anything came there and we had credit for it, she always told me about it, and I paid no further attention to it. She attended to the books herself.

Q. As a matter of fact, lumber delivered by you under this contract is still in the yards of Kelley & Company? A. Yes, sir.

Q. Up to this very date?

A. At Cottonwood; yes, sir.

Q. Did you not see it on yesterday?

A. I saw it yesterday when we came by Cottonwood.

[Testimony of Jefferson D. Ogburn, for Plaintiff.]

JEFFERSON D. OGBURN, called for the plaintiff.

Mr. DOZIER.—Q. Did you meet Mr. Kelley, Mr. William E. Kelley, the co-partner of Mr. Allan H. Daugharty, during the month of September, or October, 1905, in Shasta County, at Anderson?

A. I don't remember the month exactly.

Q. Well, in the late fall or early winter of the year 1905? A. Yes, sir, I met him.

Q. Were you present at the conversation occurring between Mr. Benton and Mr. Kelley, relative to a settlement under a contract, a final settlement for lumber? A. I was.

Q. Do you remember what requests were made by Mr. Benton or Mr. Kelley, and what Mr. Kelley promised in relation to the matter?

A. I don't remember just word for word.

Q. As near as you can give the words that were used and the conversation occurring between those gentlemen relative to the settlement of the contract for lumber, I wish you would do so?

A. I heard Mr. Kelley tell Mr. Benton that just as soon as they could get things straightened up in the yard, and everything straightened up, they *would him* his money.

Q. And that was upon Mr. Benton's demand for a final settlement?

A. Yes, sir. He and I went there together, and he asked him for a settlement.

(Testimony of Jefferson D. Ogburn.)

Q. You went there for that purpose, did you not?

A. Yes, sir. I did not go there for the purpose of a settlement, but I went with him, and that is what we went for.

Q. You understood what it was for when you went?

A. Yes, sir. That is what he told me it was for. I just rode down to Anderson with him and was there in the buggy when they had their talk.

Cross-examination.

Mr. CORBET.—Q. As soon as the lumber was searched out in the yard, and he could get it straightened out, he would pay him for the lumber?

A. He told him that just as soon as he could get things straightened up, and they would straighten them up as soon as they could, he said, "You will get you money."

Q. Where was that conversation held?

A. Right in front of Mr. Warren's office, at his factory in Anderson.

Q. Who was there besides yourself and Mr. Kelley and Mr. Benton?

A. Mr. Warren, and I think Mr. Wink was there, I am not sure, but I think he was, and I don't know whether Mr. Clifton was there or not. There were two or three men there. Mr. Warren was there, I know, and I think Mr. Gillis' son.

[Testimony of A. F. Smith, for Plaintiff.]

A. F. SMITH, called for the plaintiff.

Mr. DOZIER.—Q. Do you remember the occasion of a visit to California by Mr. Daugharty dur-

(Testimony of A. F. Smith.)

ing the month or about the month of December, 1905?

A. I could not say what month it was in the fall of 1905, but I remember the occasion that you are leading up to. The day of the month, or even the month, I do not call to mind now. I might have data some place that I could refresh my memory from that would call to mind the time.

Q. Well, it was late in the year 1905, was it not, Mr. Smith? A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. The day or month you would not state positively? A. No, sir.

Q. I am leading up to an occasion of a settlement, on a conversation, we will call it, between Mr. Daugharty and Mr. Benton, relative to a lumber contract between Benton and Kelley & Company. That is the occasion I allude to.

A. I understand.

Q. In the latter part of the year 1905?

A. Yes, sir.

Q. Where was that conversation Mr. Smith?

A. It was in Mr. Warren's office at Anderson.

Q. Who was present there?

A. Mr. Daugharty, Mr. Warren, Mr. Benton; myself, Mr. Lowden—John R. Lowden of Redding, Mrs. Larsen, and there were others in and out, but I do not call to mind now that anybody else was present during the conversation.

Q. Do you know with what purpose Mr. Benton was there?

(Testimony of A. F. Smith.)

A. He went there to try to effect a final settlement with Mr. Kelley & Company.

Q. With Kelley & Company?

A. That is the way he talked to me, at least.

Q. Relative to what, do you say?

A. To the closing up of their lumber deal that they had under this contract that you presented here.

Q. Do you know what agreement was reached between Mr. Daugharty representing himself and his copartner on the one side, and Mr. Benton on the other—at that settlement?

A. The way I understood it, from the conversation that occurred there during that meeting, why, it was that they agreed to select each of them a lumber grader and go through the lumber that had been rejected as not being as good as 2 shop and better, and they would select out any lumber in that lumber that had been rejected by Mr. Kelley that was good enough to fill the grade of 2 shop and better, and after they did that, I believe if they got near enough together on measurements, from what I understood of their conversations, not to disagree on the measurement of the lumber, they would settle it without a third, or they might have to have a third man. They only seemed to differ on the grades.

Q. Mr. Smith, was not a certain estimate of lumber up to November 9th accepted as correct, agreed upon as correct, and to be taken as correct?

Mr. CORBET.—I object to the question as leading, the witness not having been shown to be famil-

(Testimony of A. F. Smith.)
iar with any estimate or statement of the amount of lumber previously shipped at that time.

The COURT.—The objection is certainly good as to the question being leading.

Mr. DOZIER.—Q. What, if anything, was stated or agreed upon or determined as to the amount of lumber delivered up to a certain time, made by any individual?

A. As well as I remember, as I stated a moment ago, I think they agreed on the quantity of lumber delivered. It was only a difference between them on the quality of this lumber that had been rejected. They agreed, as I understood them to say, that they would each pick a man to determine the amount of lumber that was in this lumber that had been rejected that should have been accepted on the contract, and after that, why—

Q. One moment. Just answer that alone. Was that all that was agreed upon about each picking a man, or was there anything further said about this arbitration, or of doing it?

A. Well, as Mr. Benton stated, and I said a moment ago, after that the two men were to select a third man, if necessary, and the agreement was to be final, if there was any lumber of consequence rejected. I don't remember the language that was used by either one or both sides, so far as that is concerned. But there was a great deal said, in one way and another, and so I could not very well remember.

(Testimony of A. F. Smith.)

Q. I understand they agreed to select two graders, and if those two graders could not substantially agree, they were to select a third one, whose judgment was to be final on that?

A. That is my remembrance of that, yes.

Q. Go on with your statement, Mr. Smith, the statement that you were making when I interrupted you? You said after the grading of the lumber was determined then something else, and I interrupted you.

A. Well, as I remember it, they arrived at a conclusion, you understand that that should be a basis for the settlement, because they found out the amount of lumber that had been rejected that ought to be accepted, and that they they were ready for a final settlement.

The COURT.—Q. How do you mean, a final settlement? Do you mean a payment?

A. To pay Benton for the lumber that had been delivered by Mr. Benton to Mr. Kelley.

[Testimony of W. F. Smith, for Plaintiff.]

W. F. SMITH, called for the plaintiff.

Mr. DOZIER.—Q. Mr. Smith, were you ever called upon by Mr. Clifton, the agent of W. E. Kelley & Company at Anderson, to make a scale of the lumber delivered to Kelley & Company by Benton?

A. I was ordered to make an estimate.

Q. Where was the lumber?

A. In the Anderson yard, in the Cottonwood yard.

(Testimony of W. F. Smith.)

Q. Who directed you to do this?

A. Mr. Clifton.

Q. Did he announce for what purpose it was to be made? A. He did.

Q. What was it?

A. He said it was for the purpose of a settlement with Mr. Benton—they wanted to settle up with him and get rid of him.

Q. Was it anything more than as to the determining of the various grades of lumber?

A. Well, yes, it was for getting an estimate of all the lumber there was in the yard.

Q. What do you mean by all of the lumber?

Mr. CORBET.—I suggest that the witness be restricted to stating what Mr. Clifton told him to do.

Mr. DOZIER.—That is the purport of my question. I will so modify it, if it requires.

The COURT.—I understood it that way. Just confine your testimony to what you were directed by Mr. Clifton to do, Mr. Smith—what he stated as the purpose.

A. Well, he directed me to take an estimate of all the lumber in the yard—all Mr. Benton's lumber.

Mr. DOZIER.—Q. Did he allude to particular lumber?

A. No, sir, all of it—different grades and different lumber, sugar pine and white pine.

Q. What do you mean by different grades? You know what the Benton contract was, do you not?

A. Yes, sir.

(Testimony of W. F. Smith.)

Q. Do you mean the grades under that, or all of the lumber of every kind and character?

A. All the lumber of every kind and character.

Q. Those were his instructions?

A. Yes, sir.

Q. That included what?

A. That included all the lumber that Mr. Benton had in the yard, and what they had already shipped.

Q. But that is not what I mean. What did that include as to the kinds of lumber?

A. It included common, box, shorts, 1 shop and 2 shop, and 3 clear and 2 clear—1 and 2 clear.

Q. And anything else?

The COURT.—He has stated all the Benton lumber in the yard. How can there be anything any more comprehensive than that.

Mr. DOZIER.—I wanted to get at the different grades of the lumber.

A. The common lumber was the roofing boards and all of that stuff that had to be taken into consideration.

Q. Did not include covering boards or covers?

A. Yes, sir.

Q. Mr. Smith, how long were you at the Anderson yard?

A. I could not state exactly when I went there. I was there two or three months any way, and may be more.

Q. Two or three months? A. Yes, sir.

(Testimony of W. F. Smith.)

Cross-examination.

Mr. CORBET.—Q. At what time, was it, Mr. Smith, that Mr. Benton told you to go out and make an estimate of the lumber in the yard?

A. I don't remember exactly; I think it was some time either the first of November or the last of December—I mean something along the last of November or the first of December, or sometime along there.

Q. Did it include making an estimate of the lumber both in the Cottonwood yard and the Anderson yard? A. Yes, sir.

Q. How long did it take you to make those estimates?

A. Oh, I guess it was four or five days, or a week maybe.

Q. How long?

A. Four or five days, maybe.

Q. How many estimates did you make—more than one?

A. I made one, and then there was some more lumber came in afterwards, and the first one there was not anything said about the roof boards, and then they wanted the roof boards put in afterwards, and Mr. Clifton put a man to count the roof boards, a man by the name of Fairbanks, and they went in with my estimate—I did not count them.

Q. You did not count them?

A. No, sir. That was the reason we went back over it, I presume.

Q. Did you make more than two estimates?

A. I don't think so.

(Testimony of W. F. Smith.)

Q. Did you re-estimate the second time the lumber which you had estimated the first time?

A. Yes, sir, we went back over it.

Q. And re-estimated it? A. Yes, sir.

Q. Did you re-estimate it? A. Yes, sir.

Q. Did your re-estimates agree?

A. There was not very much difference.

Q. Was there any? A. What.

Q. Was there any difference between the two estimates that you made?

A. I don't know that there was. I turned my estimates in there at the first—I don't remember that there was.

Q. Did you make your footings to find out the total number of feet?

A. I had a tally boy, and he footed it up, and I ran over it afterwards to see if it was correct.

Q. Did you find it was correct?

A. Yes, sir.

Q. Your instructions, then, were to estimate the lumber in the yard, the two yards in question?

A. Those were my instructions.

Q. You were to make a physical examination of this lumber for the purpose of ascertaining the total number of feet in the yard?

A. Yes, sir, that was it.

Q. Do you remember how many feet there were in the yard?

A. I don't remember, but I think it was somewhere in the vicinity of two and a half million feet—that is, what had been shipped out and what was

(Testimony of W. F. Smith.)
there. I don't remember what was in the yard at that time, but the whole total of that was something over two and a half millions.

Q. I thought your instructions were to estimate what was in the yard?

A. No, sir. It was to estimate what had been shipped out too; that is to take what had been shipped out from the nooks.

Q. How much had been shipped out at that time? Do you know? A. No, sir, I do not.

Q. Do you know how much remained in the yard at that time? A. No, sir, I do not.

Q. Where did you get your information as to what had been shipped out?

A. I got it off of the shipping receipts—the stubs of the shipping receipts.

Q. The stubs of the shipping receipts?

A. Yes, sir.

The COURT.—He got it from the stubs of the shipping receipts, he says, yes.

Mr. CORBET.—Q. Showing you this book, is that what you mean by a shipping receipt?

A. (After examining the book shown him.) I don't think that is what we used there.

Q. It was not an instrument of that kind that you used?

A. I don't know whether this is the book we used there. It is a shipping receipt.

Q. Was it a book of instruments of that character which you used? A. Yes, sir.

Q. Was there more than one of them?

(Testimony of W. F. Smith.)

A. I don't know whether there was more than one or not.

Q. From whom did you procure those shipping receipts?

A. I procured them in the office, from the girl who was working in there.

Q. What was her name?

A. Kratzer, if I am right about it—I am not at all sure whether that is correct or not.

Q. Was it not Mrs. Larsen?

A. I could not tell you.

The COURT.—Mrs. Larsen, he asks.

A. I could not tell you—I don't remember that. I cannot say what her name was.

Mr. CORBET.—Q. Then the amount you ascertained had been shipped out was ascertained solely from the shipping receipts handed to you by the woman in question? A. Yes, sir.

[Testimony of O. F. Oliphant, for Plaintiff.]

O. F. OLIPHANT, called for the plaintiff.

Mr. DOZIER.—Q. Mr. Oliphant, do you remember the occasion of the visit to Anderson of Mr. W. E. Kelley, one of copartners of the defendants there?

A. Yes, sir.

Q. During the latter part of 1905?

A. Yes, sir.

Q. Do you know Mr. Allan H. Daugharty, the other of the copartners?

A. I saw him when he came on the cars—I didn't know who he was.

(Testimony of O. F. Oliphant.)

Q. You know him by sight? You know the gentleman to whom I refer?

A. Yes, sir, it is the gentleman sitting there between Mr. Warren and the attorney.

Q. You recall the occasion of his visit to Anderson? A. Yes, sir.

Q. Do you remember about when it was?

A. Well, no, I could not state—it was somewhere close to the first of the year, I don't know just when.

Q. The first of the year 1906?

A. Yes, sir.

Q. Then that would be the latter part of 1905?

A. Yes, sir, right along there somewhere. It was in the winter time; I don't know just exactly when.

Q. After Mr. Daugharty's visit to Anderson, did you have any conversation or talk with Mr. Clifton, and any instructions from him relative to the Benton lumber?

A. Well, yes, I talked to Mr. Clifton every day. Right after Mr. Benton came—or rather Mr. Daugharty and Mr. Kelley came, he said that they had settled up with Mr. Benton, and would get rid of him.

Q. Did he say anything further than that—further than saying that they had settled up with Mr. Benton, and would get rid of him?

A. Yes, sir, they had paid him, he said.

Q. In relation to the matter of paying attention to grades from that time on did he say anything?

A. No, sir. He never—well, we took, yes, we did ship—

(Testimony of O. F. Oliphant.)

Q. (Intg.) One moment. Do not misunderstand me. I am not talking about what you shipped now. At the time that Mr. Benton told you that they had settled up with Mr. Benton, that was after the visit of Mr. Daugharty, did he say anything in relation to your paying attention to the grades in shipping?

A. I don't understand just what you mean, Mr. Dozier.

Q. You knew that Benton's contract, you had talked with Mr. Clifton about Benton's contract, and you knew it called for the description of lumber that was known as No. 2 shop and better, did you not?

A. Yes, sir.

Q. After Mr. Clifton told you they had made a settlement with Mr. Benton and paid him, in relation to grading Benton's lumber, did he say anything in regard to paying attention to the grades under that contract, or disregard it?

A. Well, he told us that he had settled up, and the lumber all belonged to Kelley now—that he had settled up with Benton and that the lumber all belonged to Kelley, that is, Benton's lumber did, and they had got rid of him, and so it was all just the way it had been graded, that is the way we were to take it—that is the way I understood it.

Q. That the lumber all belonged to Kelley?

A. Yes, sir.

Recross-examination.

Mr. CORBET.—Q. When did the conversation take place that you have referred to with Mr. Clifton about the settlement?

(Testimony of O. F. Oliphant.)

A. Right away after Mr. Kelley and Mr. Daugharty were there.

Q. Have you any distinct recollection of when they were there?

A. I could not tell you the month or the day, no, sir.

Q. You merely remember it from the occurrence that they were there?

A. Yes, sir, they were there, and Mr. Benton was there also, and Mr. Clifton had told us sometime before that Mr. Kelley would come out there to visit the yard, and of course we were looking for him.

Redirect Examination.

Mr. DOZIER.—Q. Mr. Oliphant, as I understand you, Mr. Kelley came there first to Anderson, and subsequently Mr. Daugharty came there?

A. I think that was the way.

Q. And then you say that Mr. Daugharty came upon other occasions? A. Yes, sir.

Q. In order to fix your memory more accurately in relation to Mr. Corbet's question, is it not a fact that after the visit of Mr. Daugharty, Mr. Kelley came there, and then came Mr. Daugharty, and when you had that conversation with Mr. Clifton relative to Benton and Kelley & Company owning all of this, that previous to that you had assisted in making an estimate of the characters of lumber in the yard, so that this settlement could be made?

A. Yes, sir.

[Testimony of John R. Lowdon, for Plaintiff.]

JOHN R. LOWDON, called for the plaintiff.

Mr. DOZIER.—Q. Mr. Lowdon, where do you reside? A. In Redding, California.

Q. By profession or business, you are a bookkeeper, are you not, secretary? A. Yes, sir.

Q. Do you remember the occasion of a visit to Anderson of Mr. Allen H. Daugharty, one of the copartners in the firm of Kelley & Company?

A. I do.

Q. About the last of the year 1905—say during the month of December, 1905?

A. Sometime in the month of December, 1905.

Q. Prior to that time you had gone to the office of Kelley & Company at Anderson and done some work there? A. Yes, sir, I did.

Q. What was the nature of the work that you did?

A. I went in and I asked to see Mr. Benton's account—tally-sheets—

Q. (Intg.) No, just the nature of the work, I do not care for the tally-sheets, because that is not material.

The COURT.—That is what he is going to give you, the nature of it.

A. I took an exact copy of what the lady bookkeeper told me was the record of his lumber

Q. Mr. Benton's lumber? A. Yes, sir.

Q. Sold to Kelley & Company?

A. Yes, sir.

(Testimony of John R. Lowdon.)

Q. That was some weeks prior to the occasion I am alluding to?

A. Yes, sir, perhaps 3 or 4 weeks.

Q. Now, then, did you go to Anderson at Mr. Benton's request? A. Yes, sir.

Q. And where did you go when you reached Anderson? In this latter visit, now?

A. We went to the office, there, where the planing-mill is, the Kelley & Company office, I suppose it is.

Q. Did you see Mr. Daugharty there?

A. Yes, sir, Mr. Daugharty was there.

Q. Was there a conversation relative to this contract occurred between Mr. Daugharty and Mr. Benton? A. Yes, sir.

Q. Who was present at that time, the time of that conversation?

A. Mr. Warren, Mr. Daugharty, Mr. Clifton, Mr. Smith—

Q. (Intg.) Mr. A. M. Smith, you mean?

A. Mr. A. M. Smith, the lady bookkeeper, and myself.

Q. And of course Mr. Benton?

A. Oh, yes, Mr. Benton.

Q. Will you kindly go on and state what occurred at that conversation? What was said and done?

A. Yes, sir. We went there to meet Mr. Daugharty, to make final settlement on this disputed lumber. So, after Mr. Daugharty explained his ideas of grading the boards, he said, "Now, we will talk business." He said, "Which one will I take," referring to Mr. Benton or Mr. Smith, and Mr. Benton

(Testimony of John R. Lowdon.)

says, "Take him"—he was standing talking with Mr. Benton about the grading. So he did. He commenced, and he says, "Now, there are certain conditions confront us here. We will acknowledge that our books are not kept right, and all this," and he said, "I believe," referring to Mr. Warren, who was standing at the telephone—he said, "I believe there is no dispute on the other lumber, just simply"—I don't know what you would call—it about six or 700,000 feet of reject or common lumber, and there was some 2-shop, I believe. So he says, "These conditions confront us, and I will tell you what I think. I will take my grader, you take your grader, and let them go on and grade this disputed lumber. Whatever they do will be all right with the company. If they cannot agree on a board, lay the board out." And Mr. Benton says, "Well, what will we do with them when we get through with those boards"? He says, "If it does not amount to but a few thousand feet, your time is valuable and I know mine is, and we won't jangle over that, we will put that in. But," he says, "if there is 40,000 or 5000 feet, we will let those two men select a grader." This was to be a final adjustment, so that there was not to be any more grading out, the way I understood it. Just as soon as these graders got through with this disputed lumber, that was to be final and Mr. Benton would not be required to hold a grader there to adjust any farther.

Q. That was to be the final settlement and he would not have any use for his grader any further, if this plan was carried out?

(Testimony of John R. Lowdon.)

A. That is what Mr. Daugharty said. He said, "When we get through with this, then that will finish it up." So then Mr. Daugharty and Mr. Benton went out into the yard together, and I believe that is about all that was said.

Cross-examination.

Mr. CORBET.—Q. Do I understand you to say, that Mr. Daugharty told him the books were not kept right?

A. Yes, sir, that is the remark he made. He says, "We will admit that our books are not in shape and properly kept."

Q. Not in good shape and not properly kept?

A. Yes, sir—up to that time, mind you.

Q. Who was present when that statement was made by Mr. Daugharty to you?

A. Mr. Benton, Mr. Smith—

Q. All of the people that you have mentioned?

A. Yes, sir.

Q. They were all within hearing distance of it, were they?

A. Yes, sir, right there in the room.

Q. Did Mr. Benton tell you that that was a final settlement?

A. Yes, sir, we left Redding with the understanding that we were to go down and have the matter straightened out with Mr. Daugharty and it was to be a final settlement.

Q. Did Mr. Daugharty tell you that was a final settlement?

(Testimony of John R. Lowdon.)

A. Yes, sir. He made the remark then, "We will settle this matter now, and went on to tell how he thought it could be done, by he appointing a grader and Mr. Benton appointing a grader and they two go on and grade and grade it out, and if there was any disputed lumber, they should lay that out to one side, and if Mr. Daugharty and Mr. Benton could not adjust it, that the two graders would select another grader, and they would settle it, and that would be the final adjustment of their lumber affairs.

Q. Did they say that it was merely an estimate under the contract for the purpose of making a payment to Mr. Benton?

A. No, sir. This matter was to be settled up then and there.

The COURT.—Q. What was it a final settlement of, Mr. Lowdon? Was it a final settlement of the amount of lumber that fell within the grades of the contract?

A. Yes, sir, that is, there was no dispute about a certain amount.

Q. I understand that. There was no dispute about that which had been graded out already?

A. No, sir, there was no dispute about that.

Q. That is, that which had been graded out already and classed as No. 2 shop or better?

A. Yes, sir.

Q. The question was as to the claimed quantity of lumber that was included in the reject pile that Mr. Benton claimed was graded too low?

(Testimony of John R. Lowdon.)

A. That is it, and these graders were to go on and adjust that matter, and that was to be a final settlement. There would be no regarding it again. That was my understanding, and that is what I understood Mr. Daugharty to mean. I understood that was what the meeting was for, to adjust these differences.

Mr. CORBET.—Q. Was the statement made in your presence as to the quantity of lumber that was in the yard?

A. I heard them remark, I think, between six and seven hundred thousand.

Q. Of lumber still remaining in the yard?

A. Of lumber that was in dispute—what they came there to really fix it up about. I don't know how much lumber was in the yard.

Q. They came there to adjust that difference, did they not?

A. There seemed to be a difference in their account, and they wanted to get that straightened out, and the—

Q. (Intg.) And as you understood it, then, there was about six or seven hundred thousand feet of lumber that Kelley & Company had there that did not come up to the grade that they had purchased?

A. I took it that there was a dispute about that number of feet of lumber that would have to be adjusted, would have to be regraded and find out how much there was.

Q. As to the grade of lumber on that amount of feet? A. Yes, sir, something like that.

(Testimony of John R. Lowdon.)

Q. As to what the grade would be as to that amount of feet in the yard?

A. (After a pause.) Do you want an answer?

The COURT.—No, you have already answered the question.

Redirect Examination.

Mr. DOZIER.—Q. This grading was to be done after Mr. Daugharty left? A. Yes, sir.

Q. He made the arrangement for the final settlement that day? A. Yes, sir.

Q. And the grading was to be subsequently done, and to be final? A. Yes, sir.

Q. That is all.

A. The way I understood it was—

Mr. DOZIER.—Q. I simply wanted to know what the arrangement was, and you state that it was made to be carried out after Mr. Daugharty's departure?

A. Yes, sir, I understood he was going to remain only two or three days and then go back home.

Mr. CORBET.—The plaintiff rests, now, does he?

Mr. DOZIER.—Yes.

Mr. CORBET.—At this time the defendants move to strike out the evidence introduced on behalf of the plaintiff referring to the question of the alleged settlement, and all of it, upon the ground and for the reason that it is incompetent and irrelevant, and is a variance from the contract as pleaded in the complaint. They have pleaded a contract in the complaint, and now they are apparently seeking to recover on a settlement, and for that reason we say

(Testimony of John R. Lowdon.)

that the evidence introduced pertaining to the settlement, or matters pertaining to the question of settlement, are all incompetent, irrelevant, and immaterial, and a variance from the contract pleaded upon.

The COURT.—The motion cannot prevail. It is not at all inconsistent with the rights of the parties under the pleadings to show that subsequent to and in carrying out the contract there was a subsequent adjustment of a difference arising out of the performance or during the performance of the contract—a difference arising between them as to one of the very things involved in the contract, and that is the grading of the lumber. The motion will be denied.

Mr. CORBET.—We take an exception.

[Testimony of B. C. Clifton, for the Defendants.]

B. C. CLIFTON, called for the defendants.

Redirect Examination.

Mr. CORBET.—Q. Your attention has been directed to this alleged paper that was signed by yourself in connection with Mr. Ruff. Just explain to the Court how that matter occurred, what was done there, how did you arrive at the amount of lumber that came within the terms of the Kelley contract, and what did not come within the terms of the Kelley contract?

A. Well, sir, the way I understood that matter was—

Q. Just tell us how you got at that.

(Testimony of B. C. Clifton.)

A. Oh, well, Mr. Ruff and I, and I had Mr. Oliphant assist us there, because I could not be there continuously—the three of us worked on there just the same as we would work on anything, shipping out the lumber, to grade it down, and discussed and thoroughly discussed and settled right there, with the exception of a few boards that we could not agree on at the time but we did agree on afterwards as being such a small amount we did not think it amounted to anything, and we stacked this lumber out in solid stacks, lengths certain, and we took the measurements of those piles, you understand, and here is where we got the percentage—so much rejects and so much No. 2 shop.

Q. Did you handle every board of the lumber that was still left in the yard, for the purpose of making that estimate? A. Oh, no.

Q. About how much lumber was in the yard approximately, at that time?

A. Well, that is a hard matter to state. I know there was a large lot there, possibly eight or nine hundred thousand.

Q. Eight or nine hundred thousand feet?

A. I should think so.

Q. In arriving at the estimate, how much of that lumber did you handle over, approximately?

A. Well, it was around 100,000.

Q. So that out of eight or nine hundred thousand feet, you handled over probably 100,000, and, based upon the estimates that you made at that time, you

(Testimony of B. C. Clifton.)
made up the result as shown in this instrument what has been signed by you? A. Yes, sir.

Q. That instrument contained a statement of a large amount of lumber estimated to have been received up to the 9th of November, 1905, as having been made by Mr. Smith? A. Yes, sir.

Q. Do you know whether that estimate is correct or not?

A. No, sir. I took Mr. Smith's word for it.

Q. You did not know anything about it of your own personal knowledge, excepting that a large amount of lumber did come into the yard?

A. Yes, sir.

Q. And when you say it came into the yard, it came in this promiscuous manner in which Mr. Benton's teams delivered it? A. Yes, sir.

Q. And it contained much lumber, considerably below the grade of lumber called for by the Benton contract? A. Yes, sir.

Q. There was no pretense at careful grading when you put it into the original piles, was there?

A. No, sir.

Q. It was merely the careful grading that took place when you shipped it out?

A. When we shipped it out.

Q. Benton never had a man there to assist you in grading at all, or keeping check on your grading? A. No, sir.

Q. It was just that way that these papers came to be made up, calling for the amount in the rough—

(Testimony of B. C. Clifton.)

it was in that way that you went over the matter and made the estimate?

A. He had sent M.r Ruff down there when he was up at Anderson to go through our rejects there, and he and Mr. Wink were down there at Cottonwood.

Q. That was after you had left Cottonwood?

A. Yes, sir.

Q. When you left Cottonwood, you left some lumber there, did you? A. Yes, sir.

Q. Do you know how much?

A. I could not state how much, no, sir.

Q. You have heard the testimony of Mr. Benton with reference to something that took place in the Kelley & Company office along in the month of November, 1905, with reference to settlement, have you not? A. Yes, sir.

Q. Were you present at any of the time that that conversation took place in the office there?

A. I was in and out.

Q. You were in and out? A. Yes, sir.

Q. Did you hear a portion of the conversation?

A. I presume I must have.

Q. Does your mind go back to the conversation which you heard? A. No, sir, it does not.

Q. This estimate that was being made was made pursuant to the terms of the contract, was it—that Mr. Ruff and you made, when you went over and graded the lumber?

Mr. DOZIER.—We object to that as exceeding leading and suggestive. It is quite an adroit method

but there is no such evidence before the Court. The witness has not said anything of the kind.

The COURT.—No, the witness has not so said.

Mr. CORBET.—Q. Have you read the Kelley & Company contract?

A. I did, I believe, when I first went up there.

Q. Are you familiar with it?

A. I am not now. I was at the time.

Q. In making estimates with Mr. Ruff at this time, did it have anything to do with the contract, so far as you know?

A. No, all I understood was that it was a question of the amount of shipping lumber that got into the rejects.

M.r DOZIER.—We object to that and move to strike it out as not responsive to the question. It is not a question of construction of the contract by this witness, or what he understood. It is a question of what he knows.

The COURT.—He repudiates having the contract in his mind when he went over this with Mr. Ruff.

Mr. DOZIER.—Yes.

Mr. CORBET.—Q. What was it made for, Mr. Clifton, that estimate, in your judgment? Do you know what the estimate was made for—at the time you and Ruff went over the lumber? What was the object?

A. I thought the object was, owing to so much discussion about this lumber that should belong to Kelley that was in the reject—I understood it was to settle how much No. 2 shop or better was in the

(Testimony of B. C. Clifton.)

rejects. That is what I understood the object to be when we went over that.

The COURT.—Q. You understood it to be with reference to the settlement of the transaction?

A. No, sir. I knew nothing about that. I knew it was the discussion—

Q. (Intg.) I thought you said you understood it to be with reference to the settlement of how much—

A. (Intg.) Two shop and better was in the rejects, yes, sir.

Mr. CORBET.—Did I understand you to say that it was with reference to a settlement?

The COURT.—He said with reference to a settlement of the question of how much No. 2 shop lumber there was in the reject.

Mr. CORBET.—An estimate of how much was in there.

Mr. DOZIER.—He said "settlement"; he did not say estimate.

Mr. CORBET.—Q. Do you mean settlement, or do you mean estimate?

A. An estimate of the amount of No. 2 shop lumber that was in there.

Mr. DOZIER.—Q. Why did you use the word "settlement," then, if you did not mean it, why did you twice use it, and wait until you were coached by your attorney to use the word?

The COURT.—Gentlemen, evidence of that kind makes a very poor impression upon the Court. If counsel will examine the witness in that manner the

(Testimony of B. C. Clifton.)

Court is bound to take it into consideration in passing upon the matter. If you will confine yourself to asking this witness or any other witness, as to what facts are, without putting the words into his mouth, I think it will be better. I do not believe counsel wants me to distinctly understand that he is trying to do that.

Mr. CORBET.—I am trying to keep within the bounds of propriety, if your Honor please.

The COURT.—It is always best not to suggest a thing to the witness. Let him tell what the fact is, and what he knows.

Mr. DOZIER.—Q. Notwithstanding your answer to Mr. Corbet, you knew and testified a little while ago that Mr. Benton was willing to act on this estimate made by Mr. Smith, and that he withdrew his inspector after that time?

A. I knew he withdrew his inspector.

Q. And you knew that he acted upon it—you knew that, in dealing with you, Mr. Benton acted upon that being the amount of lumber in the yard at that date?

A. Yes, sir—that it was so represented.

Q. And that he withdrew his inspector from the yard? A. Yes, sir.

[Testimony of Allan H. Daugharty, for Defendants.]

ALLAN H. DAUGHARTY, one of the defendants, called for defendants.

Mr. CORBET.—You have heard Mr. Benton testify with reference to an alleged settlement, Mr.

(Testimony of Allan H. Daugharty.)

Daugharty, as having been made between yourself, as a member of the firm of W. E. Kelley & Company, and Mr. Benton? A. Yes, sir.

Q. State what conversation took place at the time he has referred to.

A. This occurred about the middle of December. Mr. Benton advised us that he had hauled his lumber down, and of the date of delivery, and according to the contract with him, we should make him an advance payment on it, and that it would be necessary to estimate it. He also called my attention to the fact that the lumber, as it had been piled, after it had been brought down from the sawmill, had not been all graded. We discussed for some time that matter, and he was satisfied that the manner in which it was brought down was so fast, and the time of the year was approaching when lumber would damage if it was not covered and piled, that it was impossible to make an accurate grading but that in some lumber which had been segregated as box or common or No. 3 cuts, there was considerable contract lumber. He also called my attention to the fact that lumber that was contract lumber and was used for pile bottoms—took me over and showed them to me—lumber had been piled on lumber which was laid on the ground and then the principal pile erected on top of it. There was no doubt at all. I am a competent grader, and there was no doubt but what Mr. Benton was correct. We discussed then the matter of trying to ascertain how much of this lumber had been put into pile bottoms, into

(Testimony of Allan H. Daugharty.)

common lumber, that would come within the contract, which we had with him, and we discussed the method of inspecting enough of it accurately so that a guess could be made, or an estimate could be made as to the quantity of contract lumber that might be found in these various piles and places. I said we would have our Mr. Clifton, who was a grader, and he could appoint a man, and they could go over and discover it, grade it, sufficiently long enough to determine about the per cent. There was some talk about the possibility of disagreement between our grader and his grader, and I suggested myself that that portion that they could not agree upon should be laid out and if it amounted to any very great amount, let some disinterested grader decide that. If they had gone far enough to find 50,000 feet that we could not agree upon, that would amount to $1,200, and that we did not want to advance unless the lumber was there, and if it was there Mr. Benton had a right to a payment on it. There was no consideration that this was to be a final settlement, but simply a payment and estimate on account as provided in the contract.

Q. Was there anything said as to when a final inspection and settlement were to be made?

A. No, sir, there was nothing of that; it was implied that that would be at the time the lumber was shipped out, as provided in the contract.

Q. Then, when Mr. Benton states that that was to be a final settlement, he is in error, is he?

A. Certainly.

(Testimony of Allan H. Daugharty.)

Q. Then we understand that you do not understand that it was a final settlement?

Mr. DOZIER.—We object to that, if your Honor please, on the ground that the questions are leading and suggestive, and that this is a proposition to be determined by the Court. What we want here is the conversation.

The COURT.—The objection will be sustained. State what occurred.

Mr. CORBET.—Q. You have stated substantially what occurred and what took place at that time, and place, Mr. Daugharty?

A. I think Mr. Benton urged the matter of payment of money, that he needed some money. We did discuss as to the reason of so much lumber being there, and he was cognizant of the fact that we could not get cars, and I remember to have shown him and told him—shown him correspondence, and told him of the efforts we had made with the principals of the Southern Pacific Railroad to get cars to ship the lumber out, and I also told him that we had orders there, that it was no wilful act of ours that the delay had occurred—simply that we could not get cars to ship the lumber. We then discussed as to the amount of payment that should be made to him, and we agreed to give him certain drafts, which were given to him within a few days of that, as I recall it, taking for granted largely his entire statement that he had delivered us a certain quantity of lumber. The payments were made him and Mr. Benton assured us that there would be another

(Testimony of Allan H. Daugharty.)

$10,000, at least, due him,—that he ought to have had about $40,000. I authorized Mr. Warren to give him drafts to the amount of $30,000, and nothing more should be paid until the two men we had suggested should make their estimate, when, if they determined that there was more money due him, we would be willing to pay him.

Q. Did you make a settlement with Mr. Benton at the time stated by him? A. No, sir.

Q. Was the estimate placed upon the lumber by Ruff and Clifton made for the purpose of making a settlement with Mr. Benton? A. No, sir.

Q. For what purpose was it made?

A. Determining the amount of lumber that had been hastily piled in with box that would come under the provisions of the contract.

Mr. DOZIER.—Q. Mr. Daugharty, you had no concern, under your interpretation of the contract, with the culls, have you? A. No, sir.

Q. You had no concern with the common lumber, had you? A. No, sir.

Q. You had no concern with the box lumber, had you? A. No, sir.

Q. None whatever? A. No, sir.

Q. Then will you explain to the Court why an order was made to take an inventory of the entire yard which contained the common, culls and box, if it was not for a final settlement that this arrangement was made?

A. I have no knowledge that any such order was given.

(Testimony of Allan H. Daugharty.)

Q. You have no such knowledge?

A. No, sir.

Q. You do not say that it was not given?

A. I don't know anything about it.

Q. I simply say that you do not say it was not given? A. I don't know anything about it.

Q. I simply say, you do not say it was not given?

A. I said I don't know anything about it. I never gave it, and never authorized anybody to give it.

Q. You were there but a short time during all of this contract, were you not?

A. Yes, sir, occasionally a day at a time—

Q. (Intg.) Kindly state to the Court—

Mr. CORBET.—Let him answer the question. He has not finished his answer to the question, I think.

Mr. DOZIER.—I thought he had.

A. I said I was there occasionally a day at a time.

Q. You had finished your answer. How many times were you there prior to the 1st day of January, 1906? A. I think twice.

Q. Sir?

A. Twice, I think; I am not positive.

Q. And for a day upon each occasion?

A. I think I was there two days—

Q. (Intg.) Well, two days upon each occasion, then.

A. I think I was there two days in December; I was there two or three days in January following. I do not recall definitely of being there before December, although I believe I was.

(Testimony of Allan H. Daugharty.)

Q. Your best recollection is that you were there about two days in December? A. Yes, sir.

Q. And you possibly may have been there a day prior to that? A. Yes, sir.

Q. But you do not distinctly recall that?

A. I do not.

Q. Your agent there was Mr. Frank W. Warren, was he not?

A. He was our agent there and also in California—all over California.

Q. And right alongside of the yard where this lumber was, Benton's lumber and the other millmen's lumber, Mr. Frank W. Warren was running a box factory, a mill of some kind, was he not?

A. Yes, sir.

Q. And pretty close to these piles of lumber, was he not?

A. I think some lumber was piled within 200 feet—just to cover the insurance regulation. He got it as close to the planing-mill as the insurance regulations would allow. That was because some of it had to be dressed, and we did not want to have to move it any farther than was necessary in order to get it dressed.

Q. You had the lumber dressed at that planing-mill?

A. We had a contract with the planing-mill to dress the lumber and load it in the cars for us.

Q. W. E. Kelley & Co., were connected with that mill under a contract, then, in relation to handling this very lumber, were they not?

(Testimony of Allan H. Daugharty.)

A. In relation to dressing and loading the lumber that we bought under contract from various sawmills.

Q. Including the contract with Benton?

A. Yes, sir.

Q. As a matter of fact, was not Mr. Clifton the man who was handling the lumber in the yard?

A. That would be his business.

Q. Giving instructions concerning the piling and grading of it and the disposition of it?

A. Mr. Warren directed that.

Q. I am speaking of the actual supervision now—the yard work, so to speak?

A. That was my understanding, I have no actual knowledge of it. I knew Mr. Warren was the manager and he employed various men to accomplish what was done there.

Mr. DOZIER.—That is all, Mr. Daugharty.

[Testimony of Frank W. Warren, for Defendants.]

FRANK W. WARREN, called for defendants.

Mr. CORBET.—Q. Were you present at the time that Mr. Benton referred to in December, 1905, at the time he claimed a settlement was made between W. E. Kelley and himself? A. I was.

Q. Please state to the Court what took place at that time, when the conversation was, as near as you can recollect.

A. Mr. Benton had repeatedly asked me to make further settlement. I was uncertain as to the amount of lumber that he had delivered and pay-

(Testimony of Frank W. Warren.)

ment should be made on under the contract, for the reason that the lumber was more or less mixed in the yard; we knew that there was some common lumber in the shop lumber, and vice versa; that, owing to the rush of work at the time the lumber was brought in there, it was impossible to get exact data, and we had not been able to ship the lumber out so as to get at the facts, because we could not get cars to ship it out. I had made a great many trips all over the road to get cars, and wired, and so forth, and Mr. Benton insisted that he had brought down about two and a half million feet of lumber, in round figures.

Mr. DOZIER.—May I interrupt the witness, your Honor? Do I understand this is a conversation between Mr. Daugharty and Mr. Benton? Are you relating that?

A. I can't tell the exact conversation.

Mr. DOZIER.—Well, but I would like to make an objection to this. The counsel asked you to give a conversation between two persons.

The COURT.—Read the previous question.

(Last question repeated by the Reporter.)

The COURT.—Just state what took place at that time, Mr. Warren. The other is objectionable, unless it is in answer to a question.

A. Mr. Benton asked for a large amount of money that we were not sure was coming to him. In fact, we felt the other way, and I told Mr. Benton so. He said that he had hauled down a large amount of lumber, as I remember he claimed having hauled

(Testimony of Frank W. Warren.)

down something like two and a half million, perhaps 2,400,000 feet, or something like that, of which there must have been 2,000,000 feet number 2 shop and better, that applied on the contract. We told him that we did not think there was as much. We were under obligations to—I beg pardon, I am not stating what occurred, am I?

The COURT.—Just state what occurred there.

The WITNESS.—I started to state some of the reasons, to make the conversation plain, that is all.

The COURT.—Your counsel can ask for those, if he wants them. Just state the facts, the conversation.

A. I did not intend to lead off from the counsel's question.

The COURT.—Read the question to the witness.

The WITNESS.—Read where I stopped off on the question there. (The answer of the witness repeated by the Reporter.)

A. (Continuing.) We decided on having an estimate made, and Mr. Benton had not been satisfied with any of the estimates that we had been able to make, and we asked him to send Mr. Ruff, or asked him to send a man to go with our man and make estimates on this lumber, so that we could make a payment of an approximate amount that we owed him. I told him that I had been to the mill on different occasions, and thought that his lumber had been running very much poorer in grade than he supposed it was, and he said, "Suppose these inspectors do not agree?" Mr. Daugharty told him that there was no

(Testimony of Frank W. Warren.)

reason that they should disagree to any large extent, and if they did, why, throw out any boards they disagreed on, but they would probably find, after they got into the piles, that the number of boards that they would throw out would not amount to much, and if there was a few thousand thrown out, the matter of overpaying him some money would not cut much figure. But he did not want to pay him a large amount of money over what he thought was due him, but if the men got reasonably near to each other, that would answer the purpose. Mr. Benton said that he had drawn down about two and a half million feet, and Mr. Clifton said that he had Mr. Smith make up an estimate, and that the two came somewhere near agreeing, so that we said for estimating purposes that those estimates of Mr. Smith were near enough right, and that we would take those estimates, and then we would agree on the percentage that Mr. Clifton and Mr. Ruff made—for instance, there was supposed to be—well, there was supposed to be a large amount of lumber in the yards that belonged to Mr. Benton which had been delivered there under this contract, and also some box lumber that he had delivered to me, and they discussed whether, that they would go through and measure all that lumber. They both agreed that they should not measure all the lumber so as to get at the percentage of common that there would be piled in with the higher grade; but they said measure 50,000 feet, or such a matter, and if it is necessary to measure the whole thing, before you stop, be-

(Testimony of Frank W. Warren.)

fore you can agree on about the percentage, why, let it go. And that is about as I remember the conversation.

Q. Was a final settlement ever talked about at that time? A. No, sir.

Q. Was it ever contemplated?

A. Well, it was talked about—Mr. Benton wanted to know when we would get a final settlement, and we told him just as soon as we could ship the lumber out, that we would pay him on this estimate, all that the estimate called for, and it probably would not vary very much one way or the other, and if we had overpaid him a little, we would expect him to pay it back.

Q. Was that estimate made, then, for the purpose of complying with the terms of the contract with reference to that?

Mr. DOZIER.—We object to that question on the ground that it called for the conclusion of the witness. The question here is the conversation that occurred between the parties, not as to his conclusions about it.

Mr. CORBET.—I think the question of what took place and the conversation that occurred is proper. Mr. Warren was the party in direct command there.

The COURT.—The witness should state what was said and what was done, and I will put the construction upon what it was done for.

Mr. CORBET.—Q. The estimate, then, was made by those two gentlemen? A. It was.

(Testimony of Frank W. Warren.)

Q. Was any money ever paid to Mr. Benton after this estimate was made? A. No, sir.

Q. Do you know why? A. Yes, sir.

Q. Why?

A. Because we figured that he had all the money he ought to have, and possibly a little more.

* * * * * * * * *

Mr. CORBET.—Q. Mr. Warren, did you ever give anyone instructions to make an estimate of all the lumber in the yards. This man Smith has testified—

Mr. DOZIER.—(Intg.) We object to that on the ground that it is utterly incompetent, irrelevant and immaterial, and tends to prove no issue in the case, and is not in rebuttal of anything that was offered by the plaintiff in chief. The testimony of Mr. Daugharty and the testimony of Mr. Clifton shows that he was absolutely in charge of the yard, and it is perfectly immaterial whether Mr. Warren gave him any instructions, or not.

The COURT.—I will let the witness answer the question.

Mr. CORBET.—Q. Answer the question, Mr. Warren?

A. Please state it again.

(The last question repeated by the Reporter.)

A. Yes, sir. I have had inventories taken several times—estimates.

Q. When and by whom?

A. I instructed Mr. Clifton to have them made.

(Testimony of Frank W. Warren.)

Cross-examination.

Mr. DOZIER.—Q. Let me see if I understand you correctly about that conversation between Mr. Daugharty and Mr. Benton. I understand you to say that the lumber which had been set aside by you people, Kelley & Company, as being No. 2 shop or better was all right—there was no question about that with anybody, was there?

A. How was that?

Q. The lumber which had been sorted and set aside by Kelley & Company as being No. 2 shop and better, that was not in question, was it? The trouble, the complaint of Mr. Benton was about the No. 2 shop that was in the common. That was where the trouble came in?

A. No, sir, there was trouble in all of it. There was common lumber in 3 clear.

Q. Common lumber in 3 clear?

A. Yes, sir. It all had to be—

Q. (Intg.) It all had to be gone over then and determined? A. Yes, sir.

Q. Very well. Now, if that was the case, then, this inspection was to be made for the purpose of determining those questions, was it not?

A. Each one of them was to have an inspector?

A. Yes, sir.

Q. A grader? A. Yes, sir.

Q. And if those two could not agree, then there was to be another arrangement made, was there not?

A. Yes, sir.

(Testimony of Frank W. Warren.)

Q. Then there was no other arrangement made, was there? A. No, sir.

Q. So they must have agreed?

A. They agreed on the probable amount of that lumber in there.

Q. If you will kindly explain to his Honor how, after the report of your men here, that on November 9th there was in that yard 2,675,219 feet and out of that there was only 416,046 that was not of No. 2 shop and better, and you signed your name to this paper as to the balance of lumber as coming in, showing there is only 5 per cent. that is lower than 2 shop and better, I will be obliged to you—taking those two papers in your hands, and then testify to this Court that there was only 1,774,000 feet of lumber that came under the Kelley contract?

A. I never represented that this statement of Mr. Smith was correct at all. We simply agreed that Mr. Smith had taken—that Mr. Smith had made such an estimate, and that was near enough for temporary purposes.

Q. Mr. Warren, do you not know that after that conversation—

A. (Intg. and continuing.) I beg your pardon, I want to say this—

Q. No, I want to have you answer my questions, now. You finished your answer. Do you not know that you stated to his Honor that you told Mr. Clifton to have Smith make an estimate of that entire yard, and that he did it more than once? And do you not know that that signature of Cliftons was

(Testimony of Frank W. Warren.)

made, put on this paper, after that conversation with Daugharty, and that that was agreed upon positively as the amount of lumber in your yard?

A. No, sir, I don't know it.

Q. Will you say it was not so? You heard Mr. Smith testify yesterday that Benton withdrew his inspector on the strength of those papers, did you not? And you say that you put Clifton in charge of that work, did you not?

A. Mr. Clifton was supposed to look after that work.

[Testimony of Allan H. Daugharty, for Defendants (Recalled).]

ALLAN H. DAUGHARTY, recalled for the defendants.

Mr. CORBET.—Q. Mr. Daugherty, you have heard the testimony as given upon the stand this afternoon, which stated that you made the statement that you knew that your books had not been properly kept. You heard that statement?

A. I heard such a statement, yes, sir.

Q. Did you ever make any such statement to the gentlemen? A. I never did.

Q. Or in his presence?

A. I never did to anyone.

Q. Did you inspect the lumber and the manner in which it was piled when you made your various visits at Anderson? I am referring to the Benton lumber now?

(Testimony of Allan H. Daugharty.)

A. I remember distinctly inspecting the lumber at that particular visit at which Mr. Benton has alleged an agreement.

Q. In what condition did you find it?

A. I found it was not properly graded, any of it. We found good lumber in the piles that had been put up for clear, and found lumber in the piles that had been put for No. 3 clear, and some in every grade. I found lumber that would grade No. 1 shop, the second grade above that called for, and I found piles—piles that had been put up supposedly as box, and it was discussed quite extensively, and it was explained that this lumber was graded by men who did not know one grade of lumber from another. Sometimes a hundred feet and sometimes 50 feet from where the load had dropped it and it was an ignorant thing to note that an ignorant man had dropped a piece of box lumber in a pile of lumber No. 1 and No. 2 and vice versa.

Q. That is all.

A. And we discussed quite at length with the help available how we should pile up lumber at such a point that in grading it could not be intended to have been done—

Mr. DOZIER.—(Intg.) Q. Are you talking about a conversation, Mr. Daugharty?

A. Yes, sir.

Mr. DOZIER.—We object to that on the ground that the witness has already testified to that conversation.

(Testimony of Allan H. Daugharty.)

The COURT.—No. He is giving you the conversation. He was asked if he had examined this lumber or graded it, as I understand.

The COURT.—I would like to have you finish the case this afternoon, if it can be done. Just state what you expect to prove, Mr. Corbet.

Mr. DOZIER.—That is, what she would testify to.

Mr. CORBET.—What Mrs. Larsen tells me she would testify to. She was present and was the lady that has been referred to by all of these witnesses who was present at Anderson at the time of this alleged settlement, and she will testify that, as Mr. Daugharty has testified, that it was not a settlement that was talked of, that the conversation was about, but that it was with reference to the making of an estimate of the lumber in the yard for the purpose of making a further payment to Mr. Benton tentatively, until the lumber could be graded and shipped out.

Mr. DOZIER.—We would hardly like to admit that she would testify as Mr. Daugharty did, if your Honor please. We would like to have her here, if that is the case. If you will say that Mrs. Larsen will testify that it was her understanding, that will make a different thing of it.

Mr. CORBET.—She understood the conversation that took place at that time was not for the purpose of effecting a settlement, but merely for the purpose of effecting an estimate to be made of the lumber on hand for the purpose of a grade that came within the actual contract.

(Testimony of Allan H. Daugharty.)

The COURT.—Of course, that is a different thing from saying that she would testify as Mr. Daugharty did, because he testifies as a party, and was one of the parties to the transaction, and therefore knew what he meant.

Mr. CORBET.—I meant what was said and done at the time—what she heard.

Mr. DOZIER.—To close it up, we will admit that, on the condition that you will admit that if Mr. Ruff were here that he would say that Mr. Clifton told him at the time this settlement was being made, that it was a full and final settlement, and that there would be no more grading of the lumber thereafter. We make those admissions, and we will let that close the case. I think that is perfectly fair.

Mr. CORBET.—That Mr. Ruff would testify that Mr. Clifton told him at the time he went through and made the estimate, that it was for a final settlement?

Mr. DOZIER.—Yes.

The COURT.—You have got Mr. Clifton here to rebut him, if that was not the fact.

Mr. CORBET.—Of course, your Honor, we will make the admission, under this condition, that it is not to be construed that we admit the correctness of it.

The COURT.—No, that never is the case in such an admission. That is, when you admit that a witness would so testify, you admit that the testimony shall be considered by the Court simply as having been given by the witness to that effect, and to receive such weight as the Court shall see fit to give

(Testimony of Allan H. Daugharty.)

it. It is not a stipulation that those are the facts, unless you wish to put it in that way.

Mr. CORBET.—No, I do not want to put it that way, because I got burnt once before, by having made an admission that the testimony was correct.

The COURT.—The admission that the witness would so testify is not an admission that that is the fact at all.

Mr. CORBET.—I certainly agree with your Honor, and with that understanding, we will make that admission, and we will call Mr. Clifton to the stand for the purpose of meeting that.

The COURT.—Very well. Then it is understood that those admissions are mutually made.

[Testimony of B. C. Clifton, for Defendants (Recalled).]

B. C. CLIFTON, recalled for the defendants.

Mr. CORBET.—Q. Mr. Clifton, you have heard the statement as to what Mr. Ruff would testify here, namely, that when you and he were making up the grade or estimate of the lumber in December and January—December, 1905, and January, 1906—that you told him that that was for a final settlement of the controversy and the grade of the lumber?

Mr. DOZIER.—No, that there would be no more grading of the lumber.

Mr. CORBET.—(Continuing.) Q. And there would be no more grading of the lumber. Did you make such a statement?

A. Not to my knowledge.

(Testimony of B. C. Clifton.)

Q. Would you remember it if you had made such a statement? A. I think so.

Cross-examination.

Mr. DOZIER.—Q. You heard the testimony of Mr. Oliphant this morning, did you not?

A. Yes, sir.

Q. You heard him say that you made that statement, did you not? A. Yes, sir.

Q. You heard Mr. W. F. Smith say that you made that statement, did you not?

A. I don't recollect.

Q. Did you not hear Mr. W. F. Smith testify this morning, your grader, who graded this lumber?

A. I may have heard it.

Mr. DOZIER.—That is all.

[Testimony of A. F. Smith, for Plaintiff (Recalled in Rebuttal).]

A. F. SMITH, recalled for the plaintiff in rebuttal.

Mr. DOZIER.—Q. Mr. Smith, you heard the testimony of Allan H. Daugharty, wherein he stated that at the conversation occurring between Mr. Benton and himself, at which you were present, at Anderson, about the settlement of this lumber business, that he did not say the books were in a bad condition. I will ask you whether or not he did so state?

A. I don't remember of hearing Mr. Daugharty state that on the stand here—I may not have been in the room at that particular moment.

(Testimony of A. F. Smith.)

* * * * * * * * *

The COURT.—And what was said by Mr. Daugharty?

A. As well as I remember, in that connection now, as I described before, there was a great deal said that day, one way and another, and as well as I remember, Mr. Daugharty made the remark during the discussion there that they had gotten mixed up and in a bad shape, and they could not tell how to get out of it, and I think he said to Mr. Benton, as well as I remember, if he knew how to get out of it, or something like that, and then made some remark, as he could suggest, a plan of getting out of it—that the accounts were so confused that they could not go by them.

Cross-examination.

Mr. CORBET.—Q. Did that not pertain to the lumber that was in the yard, and the grade that had been fixed on it before that time?

A. It pertained to the lumber that Mr. Benton had delivered there.

Q. And not to the books?

A. It certainly pertained to the accounts.

Q. Did it pertain to the books showing the shipments of the lumber that had been made?

A. I don't know as there was anything said about the shipments of lumber that had been made, as far as that was concerned, but it pertained to the general accounts that were kept of the lumber that had been delivered there.

Q. That had been delivered there?

(Testimony of A. F. Smith.)

A. Yes, sir.

Q. And been put in the Kelley yard?

A. Yes, sir, and been put in the yard there at Anderson, which we all presumed was Mr. Kelley's yard.

Q. Did Mr. Daugharty or anyone else, in your presence there, at that time, make the statement that the books pertaining to the records kept, or the lumber that had been shipped out, were incorrectly kept?

A. I didn't hear anything about that.

Mr. DOZIER.—That was not what Mr. Lowden said at all. Counsel is taking it off and away—it was not as to the shipping, so it is not rebuttal and it is not proper cross-examination because we did not ask about that.

The COURT.—He has a right to cross-examine this witness as to what the conversation was that he testified to, all the statements of Mr. Daugharty.

Mr. DOZIER.—Very true, your Honor, but the point I make is that he put.

The COURT.—He put on Mr. Daugharty, of course, to contradict Mr. Lowden. However, this witness is brought on by you in rebuttal to support Mr. Lowden. Of course, he has a right to cross-examine this witness as to what the fact was, as to the statements of Mr. Daugharty.

Mr. DOZIER.—Well, if it is in that form, that is correct. I supposed we had to confine it to the confusion in the shipment by Kelley and Company.

The COURT.—No, he is not pretending that. He is asking for Mr. Daugharty's statement involved in

(Testimony of A. F. Smith.)

the suggestion that the books, so far as the piles of lumber shipped are concerned, were in confusion.

Mr. CORBET.—I think that is all.

Mr. DOZIER.—Mr. Smith, that is all.

Mr. DOZIER.—We rest in rebuttal, if your Honor please.

The COURT.—Does that conclude the evidence?

Mr. CORBET.—What I stated Mrs. Larsen's testimony would be went into the record.

The COURT.—I suppose so. I did not put it into the record. The Reporter has it, of course. That closes the evidence, does it?

Mr. CORBET.—Yes, your Honor.

The following is a correct copy of a bill of particulars rendered to defendants by plaintiff in response to demand therefor:

In the Circuit Court of the United States for the Ninth Circuit, District of Northern California.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY, ALLAN H. DAUGHARTY, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Bill of Particular Items.

In response to the demand of the defendants made for a Bill of Particular Items, the plaintiff here-

with submits the following Items on Account, by date and amount, and a Statement of Account, showing the dates and amounts of the respective payments made thereon by the said defendants.

1905.

June 6. To 19,376 feet yellow and sugar pine lumber.
June 7. To 37,176 feet yellow and sugar pine lumber.
June 8. To 20,981 feet yellow and sugar pine lumber.
June 9. To 29,354 feet yellow and sugar pine lumber.
June 10. To 14,379 feet yellow and sugar pine lumber.
June 11. To 32,894 feet yellow and sugar pine lumber.
June 12. To 29,965 feet yellow and sugar pine lumber.
June 13. To 27,229 feet yellow and sugar pine lumber.
June 14. To 18,172 feet yellow and sugar pine lumber.
June 15. To 69,436 feet yellow and sugar pine lumber.
June 16. To 14,120 feet yellow and sugar pine lumber.
June 17. To 3,792 feet yellow and sugar pine lumber.
June 18. To 8,800 feet yellow and sugar pine lumber.
June 18. To 4,566 feet yellow and sugar pine lumber.
June 19. To 28,924 feet yellow and sugar pine lumber.
June 20. To 12,836 feet yellow and sugar pine lumber.
June 21. To 32,727 feet yellow and sugar pine lumber.
June 22. To 21,471 feet yellow and sugar pine lumber.
June 23. To 28,000 feet yellow and sugar pine lumber.
June 24. To 17,685 feet yellow and sugar pine lumber.
June 25. To. 22,527 feet yellow and sugar pine lumber.
June 26. To 19,221 feet yellow and sugar pine lumber.
June 27. To 15,785 feet yellow and sugar pine lumber.
June 28. To 20,836 feet yellow and sugar pine lumber.
June 29. To 11,550 feet yellow and sugar pine lumber.
June 30. To 18,996 feet yellow and sugar pine lumber.

July 1. To 6,665 feet yellow and sugar pine lumber.
July 2. To 6,115 feet yellow and sugar pine lumber.
July 3. To 18,380 feet yellow and sugar pine lumber.
1905.
July 4. To 3,480 feet yellow and sugar pine lumber.
July 5. To 11,894 feet yellow and sugar pine lumber.
July 6. To 9,091 feet yellow and sugar pine lumber.
July 7. To 14,804 feet yellow and sugar pine lumber.
July 8. To 18,177 feet yellow and sugar pine lumber.
July 9. To 13,554 feet yellow and sugar pine lumber.
July 10. To 13,005 feet yellow and sugar pine lumber.
July 11. To 25,110 feet yellow and sugar pine lumber.
July 12. To 22,358 feet yellow and sugar pine lumber.
July 13. To 25,786 feet yellow and sugar pine lumber.
July 14. To 14,061 feet yellow and sugar pine lumber.
July 15. To 34,685 feet yellow and sugar pine lumber.
July 16. To 10,294 feet yellow and sugar pine lumber.
July 18. To 20,270 feet yellow and sugar pine lumber.
July 19. To 14,004 feet yellow and sugar pine lumber.
July 20. To 35,934 feet yellow and sugar pine lumber.
July 21. To 13,501 feet yellow and sugar pine lumber.
July 22. To 16,551 feet yellow and sugar pine lumber.
July 23. To 6,968 feet yellow and sugar pine lumber.
July 24. To 17,374 feet yellow and sugar pine lumber.
July 25. To 19,032 feet yellow and sugar pine lumber.
July 26. To 19,907 feet yellow and sugar pine lumber.
July 27. To 11,204 feet yellow and sugar pine lumber.
July 28. To 1,292 feet yellow and sugar pine lumber.
July 29. To 17,147 feet yellow and sugar pine lumber.
July 30. To 7,725 feet yellow and sugar pine lumber.
July 31. To 9,579 feet yellow and sugar pine lumber.

Aug. 1. To 12,621 feet yellow and sugar pine lumber.
Aug. 2. To 30,560 feet yellow and sugar pine lumber.
Aug. 3. To 11,297 feet yellow and sugar pine lumber.
Aug. 4. To 29,737 feet yellow and sugar pine lumber.
Aug. 5. To 15,553 feet yellow and sugar pine lumber.
Aug. 6. To 24,827 feet yellow and sugar pine lumber.
Aug. 7. To 8,644 feet yellow and sugar pine lumber.
Aug. 8. To 23,129 feet yellow and sugar pine lumber.
Aug. 9. To 8,689 feet yellow and sugar pine lumber.
Aug. 10. To 37,315 feet yellow and sugar pine lumber.
Aug. 11. To 10,329 feet yellow and sugar pine lumber.
Aug. 12. To 15,210 feet yellow and sugar pine lumber.
Aug. 13. To 18,300 feet yellow and sugar pine lumber.
Aug. 15. To 22,811 feet yellow and sugar pine lumber.
Aug. 16. To 7,974 feet yellow and sugar pine lumber.
Aug. 17. To 16,284 feet yellow and sugar pine lumber.
Aug. 18. To 10,238 feet yellow and sugar pine lumber.
Aug. 19. To 22,610 feet yellow and sugar pine lumber.
Aug. 20. To 11,942 feet yellow and sugar pine lumber.
Aug. 21. To 15,134 feet yellow and sugar pine lumber.
Aug. 22. To 13,679 feet yellow and sugar pine lumber.
Aug. 23. To 22,222 feet yellow and sugar pine lumber.
Aug. 25. To 32,242 feet yellow and sugar pine lumber.
Aug. 26. To 24,789 feet yellow and sugar pine lumber.
Aug. 27. To 1,685 feet yellow and sugar pine lumber.
Aug. 29. To 9,621 feet yellow and sugar pine lumber.
Aug. 30. To 4,013 feet yellow and sugar pine lumber.
Aug. 31. To 17,669 feet yellow and sugar pine lumber.
Sept. 2. To 15,387 feet yellow and sugar pine lumber.
Sept. 4. To 3,579 feet yellow and sugar pine lumber.
Sept. 5. To 3,762 feet yellow and sugar pine lumber.

Sept. 5. To 12,015 feet yellow and sugar pine lumber.
Sept. 6. To 5,519 feet yellow and sugar pine lumber.
Sept. 8. To 18,854 feet yellow and sugar pine lumber.
Sept. 9. To 7,782 feet yellow and sugar pine lumber.

1905.

Sept. 10. To 13,256 feet yellow and sugar pine lumber.
Sept. 11. To 16,254 feet yellow and sugar pine lumber.
Sept. 12. To 8,493 feet yellow and sugar pine lumber.
Sept. 13. To 16,470 feet yellow and sugar pine lumber.
Sept. 14. To 30,310 feet yellow and sugar pine lumber.
Sept. 15. To 14,378 feet yellow and sugar pine lumber.
Sept. 16. To 10,642 feet yellow and sugar pine lumber.
Sept. 17. To 13,479 feet yellow and sugar pine lumber.
Sept. 18. To 19,023 feet yellow and sugar pine lumber.
Sept. 19. To 12,531 feet yellow and sugar pine lumber.
Sept. 20. To 23,205 feet yellow and sugar pine lumber.
Sept. 21. To 16,915 feet yellow and sugar pine lumber.
Sept. 22. To 39,050 feet yellow and sugar pine lumber.
Sept. 23. To 24,007 feet yellow and sugar pine lumber.
Sept. 24. To 47,727 feet yellow and sugar pine lumber.
Sept. 25. To 14,741 feet yellow and sugar pine lumber.
Sept. 26. To 20,821 feet yellow and sugar pine lumber.
Sept. 27. To 14,983 feet yellow and sugar pine lumber.
Sept. 29. To 3,000 feet yellow and sugar pine lumber.
Oct. 2. To 21,854 feet yellow and sugar pine lumber.
Oct. 3. To 13,886 feet yellow and sugar pine lumber.
Oct. 3. To 9,456 feet yellow and sugar pine lumber.
Oct. 4. To 17,492 feet yellow and sugar pine lumber.
Oct. 5. To 10,273 feet yellow and sugar pine lumber.
Oct. 6. To 23,835 feet yellow and sugar pine lumber.
Oct. 7. To 17,395 feet yellow and sugar pine lumber.
Oct. 8. To 6,327 feet yellow and sugar pine lumber.

Oct. 9. To 31,435 feet yellow and sugar pine lumber.
Oct. 10. To 7,884 feet yellow and sugar pine lumber.
Oct. 11. To 17,804 feet yellow and sugar pine lumber.
Oct. 12. To 15,134 feet yellow and sugar pine lumber.
Oct. 13. To 13,218 feet yellow and sugar pine lumber.
Oct. 14. To 61,655 feet yellow and sugar pine lumber.
Oct. 15. To 6,904 feet yellow and sugar pine lumber.
Oct. 16. To 21,310 feet yellow and sugar pine lumber.
Oct. 16. To 39,377 feet yellow and sugar pine lumber.
Oct. 18. To 30,815 feet yellow and sugar pine lumber.
Oct. 19. To 39,647 feet yellow and sugar pine lumber.
Oct. 20. To 17,089 feet yellow and sugar pine lumber.
Oct. 21. To 24,448 feet yellow and sugar pine lumber.
Oct. 22. To 36,368 feet yellow and sugar pine lumber.
Oct. 23. To 32,771 feet yellow and sugar pine lumber.
Oct. 24. To 24,273 feet yellow and sugar pine lumber.
Oct. 25. To 39,819 feet yellow and sugar pine lumber.
Oct. 26. To 10,159 feet yellow and sugar pine lumber.
Oct. 27. To 34,348 feet yellow and sugar pine lumber.
Oct. 28. To 16,846 feet yellow and sugar pine lumber.
Oct. 29. To 12,297 feet yellow and sugar pine lumber.
Oct. 30. To 14,603 feet yellow and sugar pine lumber.
Oct. 31. To 12,250 feet yellow and sugar pine lumber.
Nov. 1. To 11,156 feet yellow and sugar pine lumber.
Nov. 2. To 41,586 feet yellow and sugar pine lumber.
Nov. 3. To 21,015 feet yellow and sugar pine lumber.
Nov. 4. To 3,670 feet yellow and sugar pine lumber.
Nov. 5. To 6,039 feet yellow and sugar pine lumber.
Nov. 6. To 5,000 feet yellow and sugar pine lumber.
Nov. 7. To 12,162 feet yellow and sugar pine lumber.
Nov. 8. To 3,713 feet yellow and sugar pine lumber.
Nov. 9. To 7,416 feet yellow and sugar pine lumber.

Nov. 10. To 3,576 feet yellow and sugar pine lumber.
Nov. 11. To 8,271 feet yellow and sugar pine lumber.
Nov. 12. To 4,011 feet yellow and sugar pine lumber.
Nov. 14. To 11,063 feet yellow and sugar pine lumber.
1905
Nov. 17. To 13,356 feet yellow and sugar pine lumber.
Nov. 21. To 7,217 feet yellow and sugar pine lumber.
Nov. 22. To 5,001 feet yellow and sugar pine lumber.

Total, 2,779,276, less covering boards, common box and culled lumber to the extent of
482,101 feet, being
2,297,175 feet, at the price or rate, as per contract of $24.00 per thousand.....$55,132.20

ACCOUNT CONTRA.

1905.

June 27.	By cash .....$	489.52
July 10.	By cash	107.68
July 12.	By cash	161.64
July 24.	By cash	145.68
July 27.	By cash	328.04
July 27.	By cash	118.28
Aug. 4.	By cash	5,000.00
Aug. 28.	By cash	1,748.12
Sept. 7.	By cash	183.39
Sept. 7.	By cash	362.73
Sept. 11.	By cash	278.57
Sept. 12.	By cash	7,000.00
Sept. 13.	By cash	424.17
Sept. 20.	By cash	190.30
Sept. 21.	By cash	132.76

Sept.	27.	By cash	70.70	
Oct.	4.	By cash	167.29	
Oct.	5.	By cash	557.05	
Oct.	5.	By cash	458.03	
Oct.	5.	By cash	42.96	
Oct.	5.	By cash	47.25	
Oct.	13.	By cash	17.22	
Oct.	13.	By cash	438.54	
Oct.	13.	By cash	210.44	
Oct.	16.	By cash	587.20	
Oct.	17.	By cash	94.46	
Dec.	19.	By cash	57.53	
Dec.	21.	By cash	10,000.00	
1906				
Jan.	16.	By cash	10,000.00	
Mar.	2.	By cash	5,800.00	$45,221.53

Total value of lumber sold.....	$55,132.20
Total amount of payments	$45,221.53
Balance due T. H. Benton.....	$9.910.67

Dated November 20th, 1906.

REID & DOZIER,
Attorneys for Plaintiff.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing is a full, true and correct statement of all the evidence, objections, rulings, exceptions and stipulations touching upon or relating to the settlement or determination made on or about December 14th, 1905, and the report or agreement made in pursuance thereof January 12th, 1906, together with a copy of the Bill of Particulars rendered, and all

matters and things found by paragraphs 4, 5 and 6 of the Findings of Fact, and is all of the evidence on which said Findings of Fact are based.

At the conclusion of the case, the Court ordered judgment for the plaintiff to be entered in conformity with findings thereafter to be prepared, and accordingly Findings of Fact and Conclusions of Law were prepared, and judgment entered thereon for $7,656.63, with interest from June 5th, 1906, amounting to $8,896.79.

After the entry of said judgment, and within the time allowed by law, said defendants duly and regularly prepared and served their Bill of Exceptions upon said judgment.

The foregoing Bill of Exceptions is full, true and correct, and the same is hereby settled and allowed as the Bill of Exceptions upon final judgment in the above-entitled case.

W. C. VAN FLEET,
Judge.

Dated March 19th, A. D. 1909.

The foregoing Bill of Exceptions is correctly engrossed.

REID & DOZIER,
PERRY & DAILEY,
Attorneys for Respdt.

[Endorsed]: Filed March 19, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Petition for Writ of Error and Supersedeas.

Now, come William E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and style of W. E. Kelley & Company, defendants herein, by their attorneys, Burke Corbet and J. R. Selby, and complain:

That in the record and proceedings had in said cause and in the rendition of the judgment herein entered, on or about September 28th, 1908, certain errors hath happened to the great damage of said defendants, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

Wherefore, these defendants, and each of them, pray for an order allowing said defendants to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Cir-

cuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, and for an order fixing the amount of bond for a supersedeas in said cause, and that, upon the giving of such bond, all further proceedings in this Court be suspended and stayed until a determination of said Writ of Error in said Circuit Court of Appeals.

And your petitioners will ever pray.

Dated, this 15th day of March, A. D. 1909.

BURKE CORBET and J. R. SELBY,

Attorneys for Defendants, William E. Kelley and Allan H. Daugharty, Copartners, Doing Business Under the Firm Name and Style of W. E. Kelley & Company.

[Endorsed]: Filed March 22, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Assignment of Errors.

The defendants, William E. Kelley and Allan H. Daugharty, as copartners, doing business under the firm name and style of W. E. Kelley & Company, in connection with their petition for a Writ of Error, come now and say:

That in the record and proceedings in the above-entitled matter, there are manifest errors, as follows, to wit:

1. That the Circuit Court of the United States, for the Ninth Circuit, Northern District of California, erred in overruling the objection of counsel for defendants, plaintiffs in error, to the questions, "I ask you, did you?" and "I ask you, did you have a settlement with Kelley & Company relative to this lumber?" asked of witness T. H. Benton on the trial of said cause, and in admitting said Benton's answer thereto, "I did." Said questions and answer referred to in this assignment, and the connection in which they were asked and answered, were as follows:

Mr. DOZIER (counsel for plaintiff) asked T. H. Benton, the plaintiff, a witness in his own behalf, during the plaintiff's case, "Mr. Benton, did you have a settlement of any kind with Kelley & Company concerning the lumber which you delivered in 1905, under the terms of this contract?

Answer.—"I thought I did."

Question:—"I ask you, did you?"

Mr. CORBET (counsel for Kelley & Co.).—"I object to the question as immaterial and incompetent,

as it is not embraced with the pleadings. There is no settlement pleaded anywhere in the pleadings?" The objection was overruled, and an exception taken.

Mr. DOZIER.—"I ask you, did you have a settlement with Kelley & Company relative to this lumber?"

Answer. "I did."

Said objection should have been sustained on the ground stated.

2. The said Court erred in overruling the objection of counsel for defendants, plaintiffs in error, to the introduction in evidence at the trial of said cause of a certain paper marked Plaintiff's Exhibit "D," the same being as follows:

"Anderson, Jan. 12, 1906.

According to statement of Nov. 9, 1905, made out by Mr. William Smith in behalf of Kelley & Co., Mr. Benton delivered to W. E. Kelley's yard in Anderson, Cal., lumber as follows, in total: 2,675,219 ft., box lumber, shop and better, including lumber mentioned below.

In this amount is contained 320,327 ft. common:
In this amount is contained 66,637 ft. box.
In this amount is contained 29,082 ft. cull.

410,046 ft. total.
less 2,675,219 ft.
416,046 ft. Com. cull & box.

will leave 2,259,173 ft. #2 shop and better.

Note: Roofing boards, and also lumber hauled by Still and Dewlaney is not included in above amounts, and goes separaate. The 66,637 ft. of box were sent down by Mr. Benton as box lumber.

This statement is accepted as correct.

W. E. KELLEY & CO.

B. CLIFTON."

—and in admitting said Exhibit "D" in evidence, because said Exhibit "D" was incompetent, irrelevant and immaterial, as the cause of action of the plaintiff was predicated upon a written contract, which provided that the lumber should be graded as shipped, and then as shipped it should be paid for, and said Exhibit "D" was incompetent under the pleadings.

3. The said Court erred in overruling the objection of counsel for defendants, plaintiffs in error, to the introduction in evidence, at the trial of said cause of a certain paper marked Plaintiff's Exhibit "E," being as follows:

"Anderson, Cal., Jan. 11, 1906.

All 5/4, 6/4, 8/4 etc., common white and sugar pine 504,205 ft.

Percentage graded out of this as follows:

24,083% Shop or 121,427 ft. in the 504,205 ft.

5,768% Cull or 29,082 ft. in the 504,205 ft.

Total cull and shop 150,509

504,205 ft. less 150,509 353,696 ft. common.

All 5/4, 6/4, 8/4, etc., #3 shop white and sugar pine, 389,694 ft.

Percentage of common graded out of this as follows:

8,537% common or 33,268 ft. in 389,694 ft. #3 shop or:

Common out of common	320,327
Box from mill	66,637
Cull, from mill	29,082
Common, from mill # 3 shop,	33,268
	416,046 ft.

Changes made by mutual consent.

Above statement accepted as correct. For T. H. Benton, Jos. Ruff.

W. E. KELLEY & CO.,
B. CLIFTON."

—and in admitting said Exhibit "E" in evidence, because said Exhibit "E" was incompetent and irrelevant under the pleadings, and at variance with the cause of action pleaded in the complaint.

4. The said Court erred in denying the motion of counsel for defendants, plaintiffs in error, to strike out, and in failing to strike out, the evidence offered and introduced by the plaintiff at the trial of said cause referring to the question of a settlement, said motion being the following, and being made at the close of plaintiff's case in chief, and after the plaintiff rested:

"At this time the defendants move to strike out the evidence introduced on behalf of the plaintiff, referring to the question of the alleged settlement, and all of it, upon the ground and for the reason that it is incompetent and irrelevant, and is a variance from

the contract as pleaded in the complaint. They have pleaded a contract in the complaint, and now they are apparently seeking to recover on a settlement, and for that reason we say that the evidence pertaining to the settlement, or matters pertaining to the question of settlement, are all incompetent, irrelevant, and immaterial, and a variance from the contract pleaded upon."

Said motion should have been granted on grounds stated therein.

5. The said Court erred in determining and deciding, upon the Findings of Fact, the said cause in favor of the plaintiff, defendant in error, and against the defendants, plaintiffs in error.

6. The judgment of said Court is contrary to law and the decision of said Court, evidenced by Findings of Fact in said cause in this respect, to wit: That by said Findings of Fact it appears that defendants, plaintiffs in error, paid to plaintiff, defendant in error, $45,164.00, and the total credit to which defendants, plaintiffs in error, was entitled was $45,-765.09, while the total amount of No. 2 shop or better lumber, sold and delivered by plaintiff, defendant in error, to defendants, plaintiffs in error, was 1,774,648 feet and that the price per thousand feet was $24.

7. The said Court erred in rendering the judgment in said case against the defendants, plaintiffs in error, upon the pleadings and the Findings of Fact, and in not rendering the judgment in said cause in favor of the defendants, plaintiffs in error, and against the plaintiff, defendant in error, upon the pleadings and the Findings of Fact.

8. The said Court erred in allowing evidence to be introduced on behalf of the plaintiff at the trial of said cause to the effect that on or about December 20th, 1905, an agreement was entered into by the plaintiff and the defendants, providing for a final settlement or determination thereafter to be made, of the amount and grades of lumber delivered by plaintiff to defendants, and the amount of the indebtedness of defendants to plaintiff, and evidence of said determination as made in pursuance of said agreement, because said evidence did not tend to prove or disprove any fact at issue in said cause.

9. The pleadings and Findings of Fact in said cause are not sufficient to justify the judgment rendered because by the pleadings of plaintiff defendant in error, the cause of action of plaintiff, defendant in error, is grounded upon a contract, while the judgment in said cause is based upon a settlement, or accounting, between plaintiff and defendants, not pleaded.

10. The said Court erred in holding that the evidence of a certain settlement, or determination, offerred by the plaintiff, defendant in error, was not at variance from the pleadings in said cause, and in admitting evidence of such settlement.

11. Said Court erred in determining and deciding that the written contract, upon which the plaintiff, defendant in error, based his action, had been varied and changed by a subsequent oral agreement made and entered into by the parties to said contract, not fully performed, and under which no money had ever been paid.

12. Said Court erred in concluding, as a matter of law, from the facts specially found in the decision of said Court, that plaintiff, defendant in error, was entitled to a judgment against the defendants, plaintiffs in error, for $7,656.63, besides interest and costs.

13. Said Court erred in making Findings 4, 5 and 6, of the Special Findings of Fact included in the decision of said Court, and being the following Findings:

"4. That on or about December 20th, 1905, it was orally agreed by plaintiff and defendants that a final determination and settlement of the amount and grades of lumber delivered by plaintiff to defendants, and the amount of the indebtedness of defendants to plaintiff, be made, and when so determined the sum should be paid by defendants to plaintiff; that the said determination was based and was to be based on estimates of two appraisers, one appointed by plaintiff and one by defendants, in case they could agree as to the amount of No. 2 shop and better lumber then at Cottonwood in the yard known as the yard of Kelley & Company, delivered by plaintiff; that in pursuance to such oral agreement, one Clifton was orally appointed by defendants, and one Ruff was orally appointed by plaintiff, as appraisers, and on January 11th and 12th, 1906, said Clifton and Ruff made a report, after examination of the lumber delivered by plaintiff to defendants, then at Cottonwood, California, at the place where said plaintiff had been directed to deliver said lumber by said defendants.

"5. That by said report and agreement of said Clifton and Ruff, it was determined that plaintiff had delivered to defendants 2,675,219 feet of lumber of various kinds; that of the lumber then at Cottonwood, at the time of the report, January 12th, 1906, 449,314 feet was of lower grade than that called for by the contract, and that the total amount of No. 2 shop or better lumber, as called for by the contract, which had been delivered by said plaintiff to said defendants, was 2,225,905, and said Clifton accepted this determination as correct for defendants, and said Ruff accepted the same as correct for plaintiff, that said determination was in writing, and was evidenced by two separate sheets of paper made in duplicate; one dated January 11th, 1906, purporting to be the estimate of lumber below the grades called for by the contract, then at Cottonwood, California; the other dated January 12th, 1906, purporting to be a summary and recapitulation of the total amount of lumber delivered under the contract, and the total amount of lumber, No. 2 shop and better; that it was settled and agreed by plaintiff and defendants, by the facts hereinbefore in this paragraph stated, that plaintiff had delivered to defendants 2,225,905 feet of lumber of the grade of No. 2 shop or better, according to the contract, and defendants acknowledged that such number of feet was correct, and the same was agreed to by defendants as the amount of lumber for which they were liable to pay, after deducting the just credits to which they were entitled.

"6. That defendants, on or after January 12th, 1906, were, by virtue of said estimate or determina-

tion, pursuant to said agreement of December 20, 1905, liable to pay plaintiff for 2,225,905 feet of lumber at the rate of Twenty-four Dollars (24) per thousand, amounting to Fifty-three Thousand Four Hundred and Twenty-one and Seventy-two Hundredths Dollars ($53,421.72); that defendants are entitled to credits of Forty-five Thousand Seven Hundred and Sixty-five and Nine-Hundredths Dollars ($45,765.09); that the defendants have never fully performed said agreement of December 20th, 1905, and have paid plaintiff no moneys pursuant to the said agreement."

—because the facts found by said Findings are not embraced within the issues raised by the complaint and answer in said cause.

14. The said Court erred in determining and deciding, upon the pleadings and the special Findings of Fact, the said cause in favor of the plaintiff; defendant in error, and against the defendants, plaintiffs in error, and in ordering judgment in favor of plaintiff, defendant in error, and against defendants, plaintiffs in error, and in failing to order judgment for defendants, plaintiffs in error, for $3,173.54, and interest and costs.

15. The judgment and the conclusion of law of said Court are contrary to law and the decision of said Court, on the facts of said cause evidenced by the Findings of Fact, in this respect, to wit: By said Findings of Fact it appears that the total amount of No. 2, shop or better lumber, sold and delivered by plaintiff, defendant in error, to defendants, plaintiffs in error, under the contract, was 1,774,648 feet,

and that the price per thousand feet was $24.00, and that defendants, plaintiffs in error, paid to plaintiff, defendant in error, for said lumber $45,164, and were entitled to a total credit, because of moneys paid and discount, of $45,765.09, whereby it conclusively appears that plaintiff, defendant in error, was entitled to charge and recover from defendants, plaintiffs in error, only $42,591.55 for said lumber; and that defendants, plaintiffs in error, were entitled to recover from plaintiff, defendant in error, $3,173.54 because of having overpaid plaintiff, defendant in error. Notwithstanding the said finding of fact, the conclusion of law and judgment of said Court was that plaintiff, defendant in error, was entitled to judgment against defendants, plaintiffs in error, for the sum of $7,656.63, and interest from June 5th, 1906, and costs of suit.

16. The said Court erred in finding as a fact that defendants, plaintiffs in error, were liable to pay plaintiff, defendant in error, for 2,225,905 feet of lumber, at the rate of $24.00 per thousand feet, by virtue of an estimate or determination made on or about January 11th and 12th, 1906, pursuant to a verbal agreement of December 20th, 1905, made by and between plaintiff, defendant in error, and defendants, plaintiffs in error, because said oral agreement of December 20th, 1905, and said estimate or determination of January 11th and 12th, 1906, were not set forth in any pleading in said cause, and the right of recovery, if any, of the plaintiff, defendant in error, because of said oral agreement of December 20th, 1905, and the estimate or determination pursuant thereto

of January 11th and 12th, 1906, was a different right of action, and a variance from the cause of action pleaded by said plaintiff, defendant in error, in his complaint.

17. Said Court erred in finding as a fact that defendants, plaintiffs in error, were liable to pay plaintiff, defendant in error, for 2,225,905 feet of lumber, or were liable at all, by virtue of said estimate or determination of about January 11th and 12th, 1906, and said oral agreement of December 20th, 1905, by and between plaintiff, defendant in error, and defendants, plaintiffs in error, because neither said agreement of December 20th, 1905, nor any note or memorandum thereof, was in writing or signed by any party, nor was said agreement or any note or memorandum thereof, ever fully performed, nor have defendants, plaintiffs in error, ever paid any sum whatever pursuant to said agreement, and said agreement of December 20th, 1905, was void because of the facts in this assignment set forth, which appear from the said findings of fact in said cause.

18. The said Court erred in failing to conclude, as a matter of law, from the facts specially found in the decision of said Court, that defendants, plaintiffs in error, were entitled to a judgment against plaintiff, defendant in error, for $3,173.54, and in failing to order judgment accordingly, because it appeared by the said findings of fact that defendants, plaintiffs in error, had paid to plaintiff, defendant in error, $3,173.54 in excess of the amount for which by law defendants, plaintiffs in error, were liable to plaintiff, defendant in error, on account of

the sale and delivery of the No. 2 shop or better lumber, under the contract upon which the cause of action was based, recovery for which was asked in the answer.

19. That said Court erred in drawing its conclusions of law from the findings of fact in the following particulars, viz.: The said Court erred in concluding, as a matter of law from the findings of fact,

"That plaintiff is entitled to judgment against defendants, William E. Kelley and Allan H. Daugharty, as copartners, for the sum of Seven Thousand Six Hundred and Fifty-six and Sixty-three Hundredths Dollars ($7,656.63), and interest thereon from June 5th, 1906, and costs of suit."

20. The judgment of said Court is contrary to law and not supported by the facts found, and is in conflict therewith in the following particulars, viz.:

In and by the findings of fact the Court finds that defendants, plaintiffs in error, paid to the plaintiff, defendant in error, the sum of $45,164.00, and that the total credit to which defendants, plaintiffs in error, were entitled was the sum of $45,765.09;

That the total amount of No. 2 shop or better lumber sold and delivered by plaintiff, defendant in error, to defendants, plaintiffs in error, was 1,774,684 feet, and that the agreed price per thousand was $24.00 (thus finding that the total amount of money due from the defendants, plaintiffs in error, to plaintiff, defendant in error, for lumber actually sold and delivered was $42,591.55, and that the defendants, plaintiffs in error, were entitled to a credit for payments on said lumber of $45,765.09); yet the Court

concluded that judgment should be rendered against defendants, plaintiffs in error, in the sum of $7,656.63. This conclusion is assigned as error, for, inasmuch as the complaint of plaintiff was for recovery upon a contract of sale, and was not based upon any compromise agreement, or agreement subsequent thereto, the conclusions of law should have followed the findings relevant to matters alleged in the plaintiff's complaint, and not findings on issues not raised by the pleadings.

21. That the Court erred in rendering its judgment in this case in the following particulars, viz.:

By his complaint in this action, plaintiff sought to recover from defendants certain moneys, upon the ground that plaintiff had, pursuant to a certain written contract, sold and delivered to defendants certain lumber, and that in and by said contract the price of said lumber was fixed, and that defendants had failed to pay the plaintiff the agreed price named in said contract for the lumber so alleged to have been sold and delivered in accordance with the terms of said contract; that plaintiff failed to prove that all lumber sold and delivered under and pursuant to the terms of said contract had not been paid for, but, on the contrary, the evidence showed, and the Court found, that the lumber sold and delivered under and pursuant to said contract had been paid for, and plaintiff had received all, if not more than, the full contract price for said lumber. That, notwithstanding said finding, the Court further found that in and by virtue of a different agreement than that relied on in the complaint, made between plaintiff and de-

fendants, defendants were indebted to plaintiff for certain moneys. That said findings, to the effect that defendants were indebted to plaintiff because of the different agreement that that relied on in the complaint, were outside of the issues raised by the pleadings, and the evidence introduced in support of said findings was objected to by defendants on this ground. That defendants never consented to the trial of issues, nor did the pleadings raise issues upon which the judgment or conclusions of law in this case are based. That notwithstanding the fact that the complaint of plaintiff did not raise the issues, and that the defendants did not consent to the trial of the issues, the Court nevertheless made findings upon said issues and rendered judgment in favor of plaintiff and against defendants on a cause of action on which the complaint is not based, and at variance with the cause of action sued on, which said action of the Court in so rendering judgment upon a cause of action not sued on, is hereby assigned as error.

22. That there is a fatal variance between the complaint and the decision in this: The complaint is based on one contract and the decision was based on another and different contract not mentioned in the complaint, and upon which the action was not based.

Wherefore, defendants, plaintiff in error, pray that the judgment of said Court be reversed, and judgment ordered for defendants, plaintiffs in error, for the amount of $3173.54, and interest and costs.

Dated this 15th day of March, A. D. 1909.

BURKE CORBET, and
J. R. SELBY,

Attorneys for Defendants, William E. Kelley and Allan H. Daugharty, Copartners, etc.

[Endorsed]: Filed March 22, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Order Allowing Writ of Error.

The defendants, William E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and style of W. E. Kelley & Company, having filed herein and presented to the Court their petition praying for a writ of error, and their assignment of errors intended to be urged by them, praying also that the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises, on consideration whereof.

The Court does allow the Writ of Error to have reviewed the said judgment and record by the United States Circuit Court of Appeals for the Ninth Judi-

cial Circuit, and that the amount of the bond on said Writ of Error be and the same is hereby fixed at Fourteen Thousand Dollars ($14,000.00).

Dated this 22d day of March, A. D. 1909.

W. C. VAN FLEET,

Judge.

[Endorsed]: Filed March 22, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Order Fixing Amount of Bond on Writ of Error and Supersedeas.

The defendants, William E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and style of W. E. Kelley & Company, having this day filed their petition praying for a Writ of Error, and also praying that an order be made fixing the amount of security which the said defendants should give and furnish upon said Writ of Error, and that upon the giving of said security that all further proceedings in this court be suspended and

stayed until a determination of said Writ of Error in the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, together with an Assignment of Errors intended to be urged by them, all within due time; and said petition having this day been duly allowed;

Now, therefore, it is ordered, that upon said defendants' filing with the clerk of this court a good and sufficient bond in the sum of Fourteen Thousand Dollars ($14,000.00), to the effect that if the said defendants and plaintiffs in error shall prosecute the said Writ of Error to effect, and answer all damages and costs if they fail to make their plea good, then the said obligation to be void; else to remain in full force and effect (the said bond to be approved by the Court); that all further proceedings in this court be and they are hereby suspended and stayed until a determination of said Writ of Error by said United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 22d day of March, A. D. 1909.

W. C. VAN FLEET,
Judge.

[Endorsed]: Filed March 22, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,907.

T. H. BENTON,

Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,

Defendants.

Bond on Writ of Error and Supersedeas.

Know All Men by These Presents: That we, William E. Kelley and Allan H. Daugharty, as principals, and the National Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto T. H. Benton, plaintiff above named, in the sum of Fourteen Thousand Dollars ($14,000.00), to be paid to the said T. H. Benton, his executors, administrators, heirs or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives, heirs and assigns, firmly by these presents.

Sealed with our seals, and dated this 22d day of March, A. D. 1909.

Whereas, the above-named defendants, William E. Kelley and Allan H. Daugharty, copartners doing business under the firm name and style of W. E. Kelley & Company, have sued out a Writ of Error to

the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the United States, for the Northern District of California, Ninth Circuit:

Now, therefore, the condition of this obligation is such,

That, if the above-named William E. Kelley and Allan H. Daugharty shall prosecute said Writ of Error to effect, and answer all costs and damages, if they shall fail to make their plea good, then this obligation shall be void; otherwise to be and remain in full force and virtue.

WILLIAM E. KELLEY, [Seal]
ALLAN H. DAUGHARTY, [Seal]
By BURKE CORBET and J. R. SELBY,
Their Attorneys.
NATIONAL SURETY COMPANY,
By FRANK L. GILBERT,
Resident Vice-President.

[Corporate Seal National Surety Company]
Attest: C. E. OBERG,
Resident Assistant Secretary.

State of California,
City and County of San Francisco,—ss.

On this twenty-second day of March, in the year One Thousand Nine Hundred and Nine, before me, Julius Calmann, a Notary Public in and for the said City and County, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the resident vice-president of the corporation described in, and who executed the

within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JULIUS CALMANN,
Notary Public, in and for the City and County of San Francisco, State of California.

Sufficiency of surety on the foregoing bond approved this 22d day of March, A. D. 1909.

W. C. VAN FLEET,
Judge.

[Endorsed]: Filed March 22, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk

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In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,907.

T. H. BENTON,
Plaintiff,

vs.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, Copartners, Doing Business Under the Firm Name and Style of W. E. KELLEY & COMPANY,
Defendants.

Clerk's Certificate to Transcript of Record.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judi-

cial Circuit, in and for the Northern District of California, do hereby certify the foregoing one hundred and thirty-eight (138) pages, numbered from 1 to 138 inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $82.20; that said amount was paid by Messrs. Corbet & Selby, attorneys for defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 15th day of April, A. D. 1909.

[Seal] SOUTHARD HOFFMAN,

Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[Writ of Error—Original.]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between William E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and

style of W. E. Kelley & Co., plaintiffs in error, and T. H. Benton, defendant in error, a manifest error hath happened to the great damage of the said William E. Kelley and Allan H. Daugharty, copartners, doing business under the firm name and style of W. E. Kelley & Co., plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 20th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 22d day

of March, in the year of our Lord One Thousand Nine Hundred and Nine.

[Seal] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by
W. C. VAN FLEET,
Judge.

Service of within Writ and receipt of a copy thereof is hereby admitted this —— day of March, 1909.

_____,
Attorneys for T. H. Benton, Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: No. 13,907. Circuit C of the United States, Ninth Circuit, Norther strict of

California. William E. Kelley and Allan H. Daugharty, etc., Plaintiffs in Error, vs. T. H. Benton, Defendant in Error. Writ of Error. Filed March 23d, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error—Original.]

UNITED STATES OF AMERICA,—ss.

The President of the United States, To T. H. Benton, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 20th day of April, 1909, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States, for the Northern District of California, wherein William E. Kelley and Allan H. Daugharty, as copartners doing business under the firm name and style of W. E. Kelley, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 22d day of March, A. D. 19[illegible].

W. C. VAN FLEET,
United States District Judge.

Service of within Citation, by copy, admitted this Twenty-fourth day of March, A. D. 1909.

REID & DOZIER,

Attorneys for T. H. Benton, Defendant in Error.

[Endorsed]: No. 13,907. In the Circuit Court of the United States for the Ninth Circuit, Northern District of California. William E. Kelley and Allan H. Daugharty, as Copartners, etc., Plaintiffs in Error, vs. T. H. Benton, Defendant in Error. (Original.) Citation. Filed March 25th, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 1710. United States Circuit Court of Appeals for the Ninth Circuit. William E. Kelley and Allan H. Daugharty, as Copartners, Doing Business Under the Firm Name and Style of W. E. Kelley & Company, Plaintiffs in Error, vs. T. H. Benton, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filed April 16, 1909.

F. D. MONCKTON,

Clerk.

No. 1710

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as copartners, doing business under the firm name and style of W. E. KELLEY & COMPANY,

Plaintiffs in Error,

vs.

T. H. BENTON,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

CORBET & SELBY,
J. F. BOWIE,
Attorneys for Plaintiffs in Error.

Filed this..... day of December, 1909.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

FERNAU PUBLISHING CO.

FILED

No. 1710

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as copartners, doing business under the firm name and style of W. E. KELLEY & COMPANY,

Plaintiffs in Error,

vs.

T. H. BENTON,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

This controversy is brought before the Court by a Writ of Error addressed to a judgment rendered by the United States Circuit Court of the Ninth Circuit, Northern District of California, Hon. W. C. Van Fleet presiding. The suit was originally brought

against the plaintiffs in error in the Superior Court of the State of California, and was removed by them to the United States Circuit Court on the ground of diversity of citizenship. In the Circuit Court a trial by jury was waived by written stipulation filed as required by Rev. Stats. 649-700. The Court made special findings of fact and rendered judgment in favor of plaintiff.

The principal grounds upon which a reversal of the judgment is sought are briefly as follows:

Plaintiffs sued to recover for a balance of the purchase price of 2,297,175 feet of lumber alleged to have been sold and delivered under a written contract. Defendant admitted the contract, but denied the sale or delivery of more than 1,750,761 feet, and pleaded payment of the contract price for that amount, counter-claiming for an overpayment of $7,577.00. The Court found that only 1,774,648 feet of lumber were sold and delivered, and that the defendants had paid the contract price for more than that amount, thus disposing of the issues raised by the pleadings in favor of the plaintiffs in error, the defendants below. The Court, however, admitted certain oral testimony over the objection for Kelley & Co., and concluded that this evidence showed the existence of a *partially* executed oral agreement (the Court found specifically that this oral agreement had not been fully executed) by which Kelley & Co. had, on Dec. 20, 1905, agreed to a modification or alteration of the contract sued upon, the effect of which

was to substitute, as a basis for final payment, *an estimate* of the amount of lumber sold and delivered in lieu of an actual *tally and inspection* called for by the contract. The result was a judgment that required Kelley & Co. to pay the purchase price for 451,257 feet of lumber *more than had actually been sold and delivered to them under the contract on which the action was based, or at all.*

No hint of the existence of the agreement upon which the Court rendered judgment for Benton is to be found in any of the pleadings. The fact is that the complaint counts altogether upon the contract in its original form. The Court finds that the plaintiff is entitled to nothing on the contract as set out in the pleadings, but allows a recovery on a modification of the contract not mentioned in the pleadings. This alone requires a reversal of the judgment, but the judgment could not stand even if supported by the pleadings, for the Court has found specifically "that " the defendants have never fully performed the " agreement of Dec. 20, 1905". This agreement was the oral agreement varying the terms of the written contract, and Sec. 1698 of the Civil Code of the State of California provides:

> "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

But, apart from this code provision, there was never a sufficient part-performance of the alleged agreement of Dec. 20th, 1905, to take it out of the

statute of frauds, or entitle Benton to any equitable relief. Indeed, Benton would, at law, recover nothing more under this agreement than he would recover under the contract itself had it not been for the errors and mistakes of the persons selected to estimate the amount of lumber delivered. The judgment of the lower Court gives Benton the benefit of these mistakes and awards to him a judgment for lumber which was not of the character called for by the contract, was never accepted by Kelley & Co., but is still in Benton's possession or has been sold by him to third parties.

These questions need not, however, be here discussed, as they are of but incidental interest, merely emphasizing the propriety of the settled rule of law which requires a reversal of the judgment.

STATEMENT OF FACTS.

William E. Kelley and Allan H. Daugharty, citizens and residents of the State of Illinois, are partners engaged in the business of buying and selling lumber, under the name of W. E. Kelley & Co.

T. H. Benton is a citizen and resident of the State of California, is the owner of a lumber mill in that State and is therein engaged in the business of manufacturing lumber.

On May 27, 1905, Kelley and Daugharty, acting in their firm name, entered into a contract with Ben-

ton. The contract was in writing and in the form of a letter written by Benton, and the written acceptance of Kelley & Co. endorsed thereon. The contract is as follows:

" Plattcau, Shasta Co., Cal., 5/27/05.
" W. E. Kelley & Co.,
" 901 Chamber Commerce, Chicago, Ill.
" Gentlemen:

" For and in consideration of one dollar ($1.00) " to me in hand paid, the receipt of which I herewith " acknowledge; I hereby offer to sell to you all the " No. two shop and better California Sugar and " White Pine that I manufacture at my saw mill " near Platteau, during the season of 1905.

" All grades mentioned in this contract are the " same as per rules adopted Apr. 1st, 1903, by the " Cal. Sug. & W. P. Agency—All lumber to be de- " livered at Cottonwood, Cal. and piled in some con- " venient place near the Southern Pacific R. R. for " shipment as directed by you.

" The price of above lumber to be twenty-four " dollars ($24.00) per M. for all grades.

" The terms of payment to be 60 ds from ship- " ment or 2% off for cash (at my option) from face " of invoice; cash payments to be made by your San " Francisco office drawing sight draft on your Chi- " cago office and remitting same promptly to Bank " of Tehama County, Red Bluff, Cal. for credit on " my account.

" The sugar and white pine to be delivered sepa-
" rately, also the several thicknesses of each to be
" delivered separate.

" In the matter of delivery, my terms will, upon
" arriving with a load at point of delivery present
" your representative with our shipping tally in
" duplicate and if said load arrives in apparent good
" order you are to O. K. one copy & return to us.
" If for any reasons loads appear damaged or short
" you to make notation of same on tally that is re-
" turned to us, this is for our convenience in keep-
" ing a check on our teamsters.

" After lumber is delivered at R. R. by us you are
" to ship the same within thirty days, as soon as
" lumber is shipped by you; you are to furnish us
" promptly with a copy of tally showing the num-
" ber of feet shipped by your men.

" I am to always have the privilege of keeping an
" inspector on the ground to keep a check on your
" inspector if I desire.

" In the event of your not shipping any portion
" of the above lumber within 30 ds from the time it
" is rec'd, you are at my request to make an esti-
" mate of said lumber and make settlement for same
" as per above terms.

" It is understood that the above settlement based
" on estimates is not to be final, but is subject to
" adjustment after the final inspection at time of
" shipment is made by you.

" All lumber is to be delivered by me, dry and in
" first class manner.

" All lumber is to be properly edged and other-
" wise properly manufactured.

" The above proposition does not refer to any
" stained lumber which I may have, should I have
" of any such lumber it is subject to further nego-
" tiation at the option of both parties.

" All lumber to be manufactured to standard
" lengths widths and thicknesses.

" You agree to take all my short clear 5/4 6/5 &
" 8/4, 10" & over wide 4 ft. & over long or if 6 ft.
" 8" or over long it may be 5¼ inches and up wide
" @ $20.00 per M at same point of delivery & terms.

" And Sugar Pine I deliver in excess of 15% of
" the total cut, you are to pay me three dollars
" ($3.00) per M extra for.

" All lumber to be manufactured as nearly as pos-
" sible to your trade requirements as you advise us
" from time to time, but I reserve the right to not
" cut anything over 3 inches thick, and not to cut
" over 50 M 3" and 100 M 2½" and none over 16
" ft. long.

" Yours truly,

" T. H. Benton.

" Accepted:

" W. E. Kelley & Co.,

" By Frank W. Warren."

The particular provisions of the contract which must be borne in mind in order to arrive at a full understanding of the facts, are:

(1) The contract was a contract for the purchase and sale of No. 2 shop and better;

(2) Benton was to deliver lumber at Cottonwood, California, and the question as to the grade of the lumber delivered was to be determined at that point;

(3) The contract obviously contemplated that the regular mill run should be delivered at Cottonwood and there graded. That is, Benton was to deliver at Cottonwood lumber above and below the grade called for by the contract, and Kelley & Co. were to grade it when loading the No. 2 or better on board cars;

(4) In order to check up, two tallies were to be taken. Benton was to tally, but not grade, the lumber when shipped in wagons from his mill, and his tally was to be O.K.d if the load arrived in apparently good order. This tally covered all grades. Within 30 days after lumber was delivered, all No. 2 shop or better was to be shipped by Kelley & Co. That is, Kelley & Co. was to grade and tally the lumber delivered and ship all No. 2 or better within thirty days after delivery. *At the time the lumber was shipped it was to be tallied by Kelley & Co. The lumber was to be paid for on the basis of this shipping tally and Benton was given the privilege of keeping an inspector on the ground to keep check on the inspector of Kelley & Co.*

(5) *In the event that Kelley & Co. failed to ship in thirty days after delivery, they were required, on request of Benton, to make an estimate of the lumber*

which should have been shipped, and pay for the same at the contract price, but these payments and estimates were not final, but were subject to adjustment when the lumber was inspected and shipped.

Between June 5th, 1905 and November 22nd, 1905, Benton delivered, in accordance with this contract, 2,779,276 feet of lumber. Of the total amount delivered there was a large amount below grade, and at the time of delivery the lumber was not graded so as to separate the different classes. (Tr. p. 46). Out of the total amount delivered, over 33⅓% was below the standard called for by the contract. Kelley & Co. shipped all the No. 2 shop or better delivered to them by Benton, which amounted to 1,774,648 feet. (Tr. p. 47).

The lumber below grade was piled separately from the lumber inspected and was retained by Benton, or sold by him to third persons. (Tr. p. 47).

Kelley & Co. did not, however, grade, inspect and ship all the lumber delivered to them within the thirty days fixed by the contract. On Dec. 20, 1905, certain negotiations took place between Daugharty and Benton arising out of the failure of Kelley & Co. to ship all lumber within the thirty days.

The above Statement of Facts up to this point is a segregation of those findings which are unquestioned. The remaining findings which are either on issues outside of the pleadings or are without evidence to support them, will now be reviewed, first the evidence and then the finding being stated:

As already stated, Benton had, by November 22nd, 1905, completed deliveries of lumber at points where it was to be tallied and graded, and from which it was to be shipped within thirty days, or, in default of shipment, tentatively estimated, and payments made on the basis of such tentative estimates subject to correction and adjustment by final grading and tally made on shipment. On Dec. 20, 1905, Benton advised Kelley & Co. that he was entitled to payments on estimates pursuant to the contract. At this time the lumber not shipped had not been graded or tallied. Benton and Daugharty had, at this date, a conversation, and the judgment in favor of Benton is based entirely on an oral agreement supposed to have been made between the parties at this time.

On the date mentioned it was orally agreed that the amount of unshipped lumber should be estimated, and that a payment should be made on the estimate. As to this the testimony of the parties coincides, and Benton was entitled to an estimate and payment pursuant to the contract. But the estimate and payment provided for by the contract was not final, for the contract provided:

"It is understood that the above settlement based "on estimates is not to be final, but is subject to "adjustment after the final inspection at time of "shipment is made by you."

Tr. p. 5.)

Benton, however, was permitted to testify, over objection, that the estimate and payment agreed to

orally on Dec. 20, 1905, was to be final and conclusive. On this point there was a direct conflict in the evidence, the witnesses of Kelley & Co. testifying that the estimate and payment arranged for orally were merely those provided for by the written contract and subject to adjustment on final tally and inspection. Benton and his witnesses were permitted to testify to the contrary over the repeated objection of Kelley & Co. that the matter was not embraced within the issues, and the evidence incompetent, irrelevant and immaterial. After Dec. 20, 1905, an estimate was made of the amount of No. 2 shop or better delivered at shipping points. The estimated amount was 2,259,173 feet. Subsequently it was ascertained when this lumber was graded and tallied on shipment, that the actual amount of No. 2 shop delivered, embracing that already shipped as well as that covered by the estimates, was 1,774,648 feet.

The findings show that the amount estimated exceeded the amount actually delivered some 451,257 feet even after arithmetical errors apparent on the face of the estimate had been corrected by the Court. According to the estimate Kelley & Co. owed Benton $53,421.72. According to the actual deliveries Kelley & Co. owed Benton $42,592.66, some $10,828.96 less than the amount called for by the estimate. Kelley & Co. made payments totalling $45,164.00.

From the foregoing statement of facts, and from the findings themselves, it appears that the only questions in the case are these:

1. Is Benton entitled to $10,828.96 more than the contract price of the lumber actually delivered by him under the written contract of May 27th, 1905, by reason of the oral modification of Dec. 20th, 1905, taken in connection with the errors of the people who made an estimate of the amount actually delivered?

2. Conceding that Benton is entitled to profit to the extent of $10,828.96 by reason of the oral agreement of Dec. 20, 1905, taken in connection with the errors of those making the estimate, can he enforce his rights on a complaint which is based on an alleged actual sale and delivery pursuant to the written contract of May 27, 1905 and make no mention of any other agreement.

THE JUDGMENT ROLL.

THE COMPLAINT.

As already stated, the complaint is based entirely upon the contract of May 27, 1905. The pleader alleges: (Tr. pp. 1, 2)

(1) "That on the 27th day of May, 1905, the "plaintiff and defendants entered into a written "contract, by which the plaintiff was to sell and de- "liver to the defendants * * * a copy of which "said contract is hereunto annexed, marked 'Ex- "hibit A' and made a part of this complaint."

(Exhibit A is the written contract of May 27, 1905, set forth at pages 5-7 of this brief.)

(2) "That in compliance with said contract, the "said plaintiff did deliver to the said defendants, "in the County of Shasta, State of California, Cali- "fornia sugar and white pine lumber of the grades "of No. 2 shop and better, to the extent of two mill- "ion two hundred and ninety-seven thousand, one "hundred and seventy-five feet (2,297,175), and the "said defendants did receive of and from the plain- "tiff, under the terms of said contract two million "two hundred and ninety-seven thousand, one hun- "dred and seventy-five feet (2,297,175) of Califor- "nia sugar and white pine lumber of the grades of "No. 2 shop and better.

"That by reason of the sale and delivery of said "lumber to said defendants, the said defendants "became indebted to plaintiff in the sum of fifty- "five thousand one hundred and thirty-two and "20/100 dollars ($55,132.20) in gold coin of the "United States."

(Tr. pp. 2-3.)

The pleader then sets forth a payment of $45,-164.00, and alleges:

"* * * and there is still due, owing, and un- "paid from the said defendants to the said plain- "tiff the sum of nine thousand nine hundred and "sixty-eight and 20/100 dollars ($9,968.20)."

(Tr. p. 3),

and prays judgment in that amount.

It is obvious that in this pleading recovery is sought on an alleged performance of the contract of

May 27th, 1905, and plaintiff does not claim under the agreement of Dec. 20th, 1905, if any such existed. Not only is this agreement not mentioned in the pleadings, but, according to the agreement of Dec. 20th, 1905, as testified to by Benton, the estimated amount of lumber delivered was the material factor, and that amount is stated in the findings as 2,225,965 feet. Whereas in the complaint it is alleged that 2,297,175 feet of lumber were delivered, and a recovery is sought of the purchase price of that amount at the contract price of $24.00 per thousand. Thus it is apparent that the complaint is not only not based upon the oral agreement of Dec. 20th, but is actually a repudiation of such agreement. The existence of the cause of action sued on is inconsistent with the existence of the agreement of Dec. 20th. This is emphasized by the bill of particulars which accompanies the complaint.

The Answer.

The answer of the defendants admits the execution of the contract sued on in the complaint, admits the delivery of 1,750,268 feet of lumber of the quality called for by the contract and 10,493 feet of shorts; alleges the purchase price of that amount of lumber to be $42,387.92; denies the delivery and receipt of any more lumber than that above mentioned, and also denies the creation of an indebtedness in the sum of $55,132.20 or any sum or amount greater than $42,387.92, and pleads payment of this amount. The answer also embraces a counter-claim, in which

Kelley & Co. allege the making of the contract of May 27th; the delivery under the contract of 1,750,-268 feet of No. 2 and 10,493 feet of shorts, an overpayment of $7,577.17 on estimates made pursuant to contract, and prays for a recovery of this sum.

THE FINDINGS.

The Court found:

(1) That the total amount of No. 2 shop or better delivered by Benton to Kelley & Co. was 1,774,648 feet;

(2) That on Dec. 20th, 1905, Kelley & Co. and Benton made an oral agreement as follows: It was agreed that certain persons should estimate the amount of lumber delivered; that the estimate should be final and conclusive, and that the contract price should be paid for the amount estimated, and that this payment should be a final and full settlement, not subject to correction on account of errors discovered by the subsequent grading and tally;

(3) That such estimate was made; that the estimated amount of lumber delivered was 2,225,905 feet; that defendants, on and after January 12th, 1906, were, by virtue of said estimate or determination, pursuant to said agreement of December 20, 1905, liable to pay plaintiff for 2,225,905 feet of lumber at the rate of twenty-four dollars ($24.00) per thousand, amounting to fifty-three thousand four hundred and twenty-one and seventy-two hundredths dollars ($53,421.72); that defendants are entitled to

credits of forty-five thousand seven hundred and sixty-five and nine hundredths dollars ($45,765.09); that the defendants have never fully performed said agreement of December 20th, 1905, and have paid plaintiff no moneys pursuant to the said agreement.

SPECIFICATION OF ERROR.

(1) The Circuit Court of the United States, for the Ninth Circuit, Northern District of California, erred in failing to render judgment in favor of defendants, plaintiffs in error, upon the findings of fact and the pleadings, and against the plaintiff, defendant in error, because the issues in the case were decided in favor of said defendants by the findings that only 1,774,648 feet of lumber had been delivered to them according to the contract, while they had paid said plaintiff $45,164.00 for the lumber sold and delivered to them under the contract.

(2) The judgment is not supported by the complaint, and the Court erred in giving judgment for plaintiff on a cause of action not mentioned in the complaint, after finding that plaintiff was not entitled to recover on the cause of action sued on.

(3) The Court erred in admitting evidence to prove the so-called oral agreement of Dec. 20th and basing its judgment on that agreement, because that agreement, being oral and not fully executed, was invalid in so far as it was designed to alter or vary the terms of the written agreement sued on.

(4) The Court erred in concluding that Benton was entitled to judgment in his favor upon the facts found, because the findings, in so far as they are responsive to the issues in the cause, show that Benton had been overpaid under the terms of the written contract of May 27th, and the findings as to the oral agreement of Dec. 20th show affirmatively that that contract had not been fully performed. As a result, the oral agreement of Dec. 20th could not, as matter of law, operate to vary the terms of the written contract of May 27th. The contract of May 27th, being in full force and effect, was the measure of the rights of the parties, and the findings show affirmatively that, measured by this contract, Kelley & Co. was entitled to a judgment of $3,173.54 against Benton on account of overpayment, and Benton was not entitled to profit to the extent of $7,656.63 on account of the errors of those making the estimate.

(5) The said Court erred in finding as a fact that defendants, plaintiffs in error, were liable to pay plaintiff, defendant in error, for 2,225,905 feet of lumber, at the rate of $24.00 per thousand feet, by virtue of an estimate or determination made on or about January 11th and 12th, 1906, pursuant to a verbal agreement of December 20th, 1905, made by and between plaintiff, defendant in error, and defendants, plaintiffs in error, because said oral agreement of December 20th, 1905, and said estimate or determination of January 11th and 12th, 1906, were not set forth or referred to in any pleading in said

cause, and the right of recovery, if any, of the plaintiff, defendant in error, because of said oral agreement of December 29th, 1905, and the estimate or determination pursuant thereto of January 11th and 12th, 1906, was a different right of action from the cause of action pleaded by said plaintiff, defendant in error, in his complaint.

(6) The Court erred in failing to conclude, as a matter of law, from the facts specially found in the decision of said Court, that defendants, plaintiffs in error, were entitled to a judgment against plaintiff, defendant in error, for $3,173.54, and in failing to order judgment accordingly, because it appeared by the said findings of fact that defendants, plaintiffs in error, had paid to plaintiff, defendant in error, $3,173.54 in excess of the amount for which by law defendants, plaintiffs in error, were liable to plaintiff, defendant in error, on account of the sale and delivery of the No. 2 shop or better lumber, under the contract upon which the cause of action was based, recovery for which was asked in the answer.

(7) The Court erred in admitting evidence of the so-called agreement of Dec. 20th over the objection of counsel for Kelley & Co. that the same was incompetent, immaterial, irrelevant, and not within the issues presented.

(8) That the said Circuit Court erred in overruling the objection of counsel for defendants, plaintiffs in error, to the questions: "I ask you, did you?" and "I ask you, did you have a settlement

" with Kelley & Company relative to this lumber?" asked of witness, T. H. Benton, on the trial of said cause, and in admitting said Benton's answer thereto, "I did", because the question was immaterial and incompetent, and without the issues raised by the pleadings, there being no settlement pleaded. (Tr. p. 56).

(9) The said Court erred in overruling the objection of counsel for defendants, plaintiffs in error, to the introduction in evidence at the trial of said cause of a certain paper marked Plaintiff's Exhibit "D", the same being as follows:

" Anderson, Jan. 12, 1906.

" According to statement of Nov. 9, 1905, made " out by Mr. William Smith in behalf of Kelley & " Co., Mr. Benton delivered to W. E. Kelley's yard " in Anderson, Cal., lumber as follows: 2,675,219 ft., " box lumber, shop and better, including lumber " mentioned below.

" In this amount is contained 320,327 ft. common.
" In this amount is contained 66,637 ft. box.
" In this amount is contained 29,082 ft. cull.

410,046 ft. total
2,675,219 ft.
" less 416,046 ft. com. cull & box

" will leave 2,259,173 ft. #2 shop and better.

" Note: Roofing boards, and also lumber hauled " by Still and Dewlaney is not included in above " amounts, and goes separate. The 66,637 ft. of " box were sent down by Mr. Benton as box lumber.

" This statement is accepted as correct.

W. E. KELLEY & Co.

" B. Clifton."

—and in admitting said Exhibit "D" in evidence, because said Exhibit "D" was incompetent, irrelevant and immaterial, as the cause of action of the plaintiff was predicated upon a written contract, which provided that the lumber should be graded as shipped, and then as shipped it should be paid for, and said Exhibit "D" was incompetent under the pleadings. (Tr. pp. 63-65.)

(10) The said Court erred in overruling the objection of counsel for defendants, plaintiffs in error, to the introduction in evidence, at the trial of said cause, of a certain paper marked Plaintiff's Exhibit "E", being as follows:

" Anderson, Cal., Jan. 11, 1906.

" All 5/4, 6/4, 8/4 etc., common white and sugar " pine 504,205 ft.

" Percentage graded out of this as follows:

" 24,083% Shop or 121,427 ft. in the 504,205 ft.

" 5,768% Cull or 29,082 ft. in the 504,205 ft.

" Total cull and shop 150,509

" 504,205 ft. less 150,509 353,696 ft. common.

" All 5/4, 6/4, 8/4, etc., #3 shop white and sugar " pine, 389,694 ft.

" Percentage of common graded out of this as fol- " lows:

" 8,537% common or 33,268 ft. in 389,694 ft. #3 " shop or:

" Common out of common,	320,327
" Box from mill,	66,637
" Cull, from mill	29,082
" Common, from mill #3 shop,	33,268
	416,046 ft.

" Changes made by mutual consent.

" Above statement accepted as correct. For T. H. " Benton, Jos. Ruff.

W. E. Kelley & Co.,
B. Clifton."

—and in admitting said Exhibit "E" in evidence, because said Exhibit "E" was incompetent and irrelevant under the pleadings, and at variance with the cause of action pleaded in the complaint. (Tr. pp. 66, 67.)

(11) The said Court erred in denying the motion of counsel for defendants, plaintiffs in error, to strike out, and in failing to strike out, the evidence offered and introduced by the plaintiff at the trial of said cause referring to the question of a settlement, said motion being the following, and being made at the close of plaintiff's case in chief, and after the plaintiff rested:

" At this time the defendants move to strike out " the evidence introduced on behalf of the plaintiff, " referring to the question of the alleged settlement, " and all of it, upon the ground and for the reason " that it is incompetent and irrelevant, and is a vari- " ance from the contract as pleaded in the complaint. " They have pleaded a contract in the complaint, and " now they are apparently seeking to recover on a " settlement, and for that reason we say that the " evidence pertaining to the settlement, or matters " pertaining to the question of settlement, are all " incompetent, irrelevant, and immaterial, and a " variance from the contract pleaded upon." (Tr. pp. 97, 98.)

Said motion should have been granted on grounds stated therein.

The Argument.

There seems to be little, if any, necessity of indulging in any extended argument on this proceeding, as the propositions of law involved are elementary and settled rules of law, as well as that the ordinary considerations of justice call for a reversal of the decision of the lower Court and the issuance of a mandate directing the entry of a judgment restoring to Kelley & Co. the sum of $3173.51, the amount which they have overpaid Benton under the terms of the contract sued upon, as shown by the special findings.

THE PLEADINGS DO NOT SUPPORT THE JUDGMENT.

The fact that the judgment rendered is not supported by the pleadings can be readily demonstrated by placing the important allegations of the complaint and the denials of the answer side by side and then quoting the findings relative to the issues thus presented:

ALLEGATIONS OF COMPLAINT.

After setting out the contract heretofore discussed in the Statement of Facts, the Complaint continues:

"That in compliance with said contract, the said plaintiff did deliver to the said defendants, in the County of Shasta, State of California, California sugar and white pine lumber of the grades of No. 2 shop and better, to the extent of two million two hundred and ninety-seven thousand one hundred and seventy-five (2,297,175) feet, and the said defendants did receive of and from the plaintiff, under the terms of said contract, two million two hundred and ninety-seven thousand one hundred and seventy-five feet (2,297,175) of California sugar and white pine lumber of the grades of No. 2 shop and better.

"That by reason of the sale and delivery of said lumber to said defendants, the said defendants became indebted to plaintiff in the sum of fifty-

DENIALS OF ANSWER.

"Defendants admit the making and entering into of the contract attached to and made a part of plaintiff's complaint, and deny that thereunder or at all plaintiff delivered to the defendants, in the County of Shasta, State of California, or elsewhere, sugar and white pine lumber, or sugar or white pine lumber, of the grade of No. 2 shop and better, to the extent of two million two hundred and ninety-seven thousand one hundred and seventy-five (2,297,175) feet, or any greater or larger amount of lumber, No. 2 shop and better, than one million seven hundred and fifty thousand two hundred and sixty-eight (1,750,268) feet, and ten thousand four hundred and ninety-three (10,493) feet of shorts.

"Defendants further deny that they, or either of them, or anyone for them, received, of and from the plaintiff, under the terms of said contract, or otherwise, two million two hun-

five thousand one hundred and thirty-two and 20/100 dollars ($55,132.20) in gold coin of the United States.

"That the said defendants have not paid the said plaintiff the said sum of fifty-five thousand one hundred and thirty-two and 20/100 dollars ($55,-132.20), or any part thereof, save and except the sum of forty-five thousand one hundred and sixty-four dollars ($45,-164.00) and there is still due, owing and unpaid from the said defendants to the said plaintiff the sum of nine thousand nine hundred and sixty-eight and 20/100 dollars ($9,-968.20)."

(Tr. pp. 2-3.)

dred and ninety-seven thousand one hundred and seventy-five (2,297,175) feet of California sugar and white pine lumber, of the grade of No. 2 shop and better, or any other or greater amount thereof than one million seven hundred and fifty thousand and two hundred and sixty-eight (1,750,-268) feet of No. 2 shop and better, and ten thousand four hundred and ninety-three (10,-493) feet of shorts."

(Tr. pp. 32-33.)

From the above quotations it is apparent that the sole issue raised by the allegations of the complaint and the denials of the answer related to the quantity of No. 2 shop or better sold and delivered, and it will be remembered that by the terms of the contract set out in the complaint and admitted in the answer, Benton was to deliver lumber at certain points on the railroad and the lumber was to be there graded and tallied, and Kelley & Co. were to accept and ship all No. 2 shop or better. The findings, made in the light of the contract, dispose of the sole issue as follows:

" That in pursuance of the terms of said contract " plaintiff delivered at Anderson, California, and at

" Cottonwood, California, 2,779,276 feet of lumber " in gross; that said lumber was delivered at various " times between June 5th, 1905 and November 22nd, " 1905, the first delivery by plaintiff being made " June 6th and the last November 22nd; that said " lumber was delivered by plaintiff at places desig- " nated by defendants, in accordance with the terms " of the contract; that of said total amount delivered " by plaintiff, there was a large amount of lumber " of a grade below that No. 2 shop and better, Cali- " fornia sugar and white pine; that said lumber was " not sorted so that the lumber of a quality of No. " 2 shop or better was separate from that of inferior " quality at the time said lumber was delivered by " plaintiff and unloaded at the places designated by " the defendants.

" That defendants have shipped, of the lumber de- " livered by plaintiff at Anderson and Cottonwood, " 1,774,648 feet of No. 2 shop and better lumber, " according to the contract.

" That defendants also caused all the lumber de- " livered by plaintiff to them, to-wit: 2,779,276 feet, " to be graded as provided by said contract at the " various times lumber was shipped by them, as " hereinbefore stated, at the time of each shipment; " that a large amount of the lumber delivered by " plaintiff to defendants was rejected by defendants " as not being No. 2 shop or better, and was piled sep- " arately from the lumber not yet graded; that, of " the lumber so rejected, plaintiff sold, to-wit: 19,000

" feet to one Cunningham prior to November 9th, " 1905, and also sold a large number of feet to one " F. W. Warren; *that in pursuance to the terms of* " *said contract, as made May 27th, 1905, defendants* " *have shipped all the No. 2 shop or better lumber* " *which plaintiff delivered to them at Anderson and* " *Cottonwood; that the total amount so shipped by* " *defendants was, as hereinbefore stated, 1,774,648* " *feet.*"

(Tr. pp. 46, 47.)

This is a finding in favor of Kelley & Co. on the issues actually tendered.

But the Court also found:

" That defendants, on and after January 12th, " 1906, were, by virtue of said estimate or determi- " nation, pursuant to said agreement of December " 20, 1905, liable to pay plaintiff for 2,225,905 feet " of lumber at the rate of twenty-four dollars ($24) " per thousand, amounting to fifty-three thousand " four hundred and twenty-one and seventy-two " hundredths dollars ($53,421.72); that defendants " are entitled to credits of forty-five thousand seven " hundred and sixty-five and nine hundredths dol- " lars ($45,765.09); that the defendants have never " fully performed said agreement of December 20th, " 1905, and have paid plaintiff no moneys pursuant " to the said agreement."

(Tr. p. 49.)

Summarized, the findings amount to this: Benton sold and delivered to Kelley & Co., under the con-

tract pleaded, only 1,774,648 feet of lumber, and has been paid in full for this amount. Indeed, he has been overpaid some $3,173.54. But, by a subsequent oral agreement Kelley & Co. agreed to modify the written contract sued on and agreed to pay Benton not for the amount of lumber actually delivered as determined by the contract, or in any other way, but for the amount which certain persons should estimate had been delivered. This estimate has been made and the amount estimated to have been delivered exceeds the amount actually delivered some 451,257 feet. For this lumber not delivered, but estimated to have been delivered, Kelley & Co. has not paid.

From these findings the Court draws the conclusion that in accordance with the contract, as modified by the subsequent oral agreement, Kelley & Co. is indebted to Benton for the price of the lumber estimated but not delivered.

This loses sight completely of the fact that the action is for lumber sold and delivered, and is based on the written contract, and makes no mention of the subsequent oral agreement. The recovery is allowed on a cause of action absolutely different from that set forth in the complaint. This is contrary to settled rules of law.

In Stout v. Coffin, 28 Cal. 65, 67, 68 the Court said:

> "The instruction is but an expression of the familiar rule of evidence that the plaintiffs must

prove the contract as alleged in their complaint, otherwise they are not entitled to recover in the action. (1 Phil. Ev. C. H. & E. Notes, 864, Note 240). * * *

"The rule that the *probata* must correspond with the *allegata* is not abrogated by the Practice Act. * * *

"The consequences of a variance between the averments in the pleading and the proof are the same under our system of practice as at common law, except that they may be, to a great extent, obviated by amendments to the pleadings, which are allowed with great liberality."

In Mondran v. Goux, 51 Cal. 151, 153, the Court said:

"The rule is well settled that a plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs."

In Bryan v. Tormey, 84 Cal. 126, 130, the Supreme Court of California, speaking by Chief Justice Beatty, said:

"The judgment of the superior court cannot be sustained, because the case proved and found is not the case made by the complaint.

"The facts proved show clearly enough that the plaintiff has a good cause of action, and is entitled to relief substantially as decreed, and if the complaint had been amended at the trial so as to conform to the proofs and to correspond with the findings, we should have found no difficulty in affirming the judgment. But this was not done, and the judgment must necessarily be reversed, and the cause remanded, in order that the complaint may be properly amended."

In Chetwood v. California Nat. Bank, 113 Cal. 414, 424, the Court said:

> "It is well settled that, where the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and the variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment (Bryan v. Tormey, 84 Cal. 126), and the point may be raised upon appeal from the judgment alone. (Putnam v. Lamphier, 36 Cal. 151.)"

Authorities to the above effect may be multiplied indefinitely, but we will merely cite on this point a few cases which will demonstrate—if such demonstration be needed—the application of the rule to the case at bar.

In the case at bar, the plaintiff sued on the contract of May 27th and recovered on the contract as modified by the agreement of Dec. 20th without pleading or mentioning the agreement of modification. He alleged a performance of the contract in its original form on his part, and non-performance on the part of the defendants. The Court has found that both plaintiff and defendant have fully performed the contract sued on in its original form, but that such contract was subsequently modified and that defendants failed to perform the same as modified. The rule above established clearly forbids such a procedure.

In Harrison v. Kansas City R. R., 50 Mo. App. 332, 336, 337, the Court said:

> "Here the plaintiff sues on the original contract, and relies for a recovery upon the subsequent modification of it. He should have stated the contract and the modification thereof so that an issue could have been made in the latter. Under the pleadings, evidence of the modification was inadmissible. The theory of the instruction was outside of the issues of fact made by the pleadings. The court did not possess the power to change by its instruction the issues which were presented by the pleadings."

In Ninman v. Suhr, 64 N. W. 1035, the Court held that—

> "To show a modification of a written contract subsequent to its execution, such modification must be pleaded."

In Pioneer Sav. v. Kasper, 52 Pac. 623, the Court held that—

> "An agreement modifying a contract on which the complaint is based is not admissible in evidence where it has not been pleaded either in the complaint or the reply."

The rule, and the reason for the rule, are clearly laid down by the Court of Appeals of New York, in the case of McEntyre v. Tucker, 36 App. Div. 53-56. In that case the Court said:

> "If the plaintiff intended to rely upon a modification of the contract, then it was incumbent upon him to set out such fact by a proper allegation in his complaint. The Code of Civil Procedure (Sec. 481) requires that a complaint shall contain a statement of the facts constituting plaintiff's cause of action. The object to be accomplished by this section of the code is to notify the defendant of the facts upon which the

plaintiff relies for a recovery; and the defendant here had the right to suppose from the allegations of the complaint that the plaintiff based his right to recover in this action upon the performance of the contract, not upon a modification of it, and that that was the issue to be tried. He was not called upon to meet any other issue. That the plaintiff was not entitled to recover under his complaint upon the theory that the contract had been modified is so well settled that an extended discussion is unnecessary." * * *

"The evidence offered by the plaintiff tending to show a waiver or modification of the contract was objected to when offered, upon the ground that it was inadmissible under the complaint. The objections, however, were overruled, and the defendant excepted. No application was made to amend the complaint, and it is, therefore, clear under every well-recognized rule relating to pleadings, as well as under the authorities cited, that the objections should have been sustained and the evidence excluded."

The language above quoted is directly applicable to the case at bar.

The rule for which we contend is not applicable only to the courts of this State. This Court, in the case of Bailey v. Bond, 77 Fed. 406, held that in an action on a contract, if a waiver as to any of its provisions is relied on, the waiver must be specially pleaded.

From the foregoing authorities, and, indeed, upon elementary principles of law, it is apparent that the judgment of the lower Court must be reversed. But inasmuch as the plaintiff was, by the ruling of the lower Court, permitted to introduce evidence to

prove whatever right of action he might have against the defendants, and the findings show full extent of his right, it will be unnecessary to direct a new trial, but this Court may, by its mandate, direct the entry of such judgment as the facts found warrant, in favor of the defendants, if it be apparent on the face of the record that a new trial would be of no avail to plaintiff, and such is the fact.

DISREGARDING THE QUESTION OF THE PLEADINGS AND CONSIDERING ALL THE FINDINGS AS WITHIN THE ISSUES, DEFENDANTS ARE, AS MATTER OF LAW, ENTITLED TO A JUDGMENT IN THE SUM OF $3,173.54, THE AMOUNT OF THE OVERPAYMENT MADE BY DEFENDANTS TO PLAINTIFF.

According to the findings of the Court, Benton delivered to Kelley & Co. 1,774,648 feet of No. 2 shop or better, and no more, and Kelley & Co. has paid Benton for this lumber $45,164.00, the same being $3,173.54 in excess of the contract price for the same, and, according to the terms of the contract, Kelley & Co. is entitled to repayment of this excess unless it be the fact that a valid contract was subsequently made modifying the agreement sued on.

So far as the question of modification is concerned, the findings, outside the issues though they be, are as favorable to Benton as anything warranted by his testimony could be These findings disclose that the written contract was in full force and effect ex-

cept in so far as the same may have been modified by the oral agreement of Dec. 20th, 1905. These findings show that that agreement was not in writing and was not fully executed. Indeed, the testimony of Benton and his witnesses makes no pretense that the agreement of Dec. 20th was either in writing or fully executed. If the unexecuted oral agreement of Dec. 20th, 1905, could not in law modify the prior written contract, it is obvious that on both the evidence and the findings judgment should be entered in favor of Kelley & Co., and against Benton for the sum of $3,173.54, the amount of the over-payment, and the mandate of this Court should direct the entry of such a judgment on the findings without a new trial.

Sec. 701 R. S. made applicable to proceedings in this Court by Sec. 11 of the Act of March 3, 1891.

Fort Scott v. Hickman, 112 U. S. 150.

Allan v. St. Louis Bk., 120 U. S. 20.

For, as said in the last cited case (p. 40),

> "All the facts of the case being ascertained by the special finding of the Court below, as they would be by the special verdict of a jury, there is no reason for awarding a new trial, but there must be a general judgment for the defendants. Fort Scott v. Hickman, 112 U. S. 150."

A WRITTEN CONTRACT CANNOT BE MODIFIED OR VARIED BY AN UNEXECUTED ORAL AGREEMENT, AND THE ORAL AGREEMENT OF DECEMBER 20TH, 1905, COULD NOT, AS MATTER OF LAW, AFFECT THE RIGHTS OF THE PARTIES UNDER THE WRITTEN CONTRACT OF MAY 27TH, 1905.

Measured by the written contract of May 27th, 1905, in the light of the special findings, the rights of the parties are perfectly clear. Kelley & Co. has paid Benton some $3,173.54 more than Benton was entitled to receive for the amount of lumber actually delivered, and, by the terms of that contract, Kelley & Co. is entitled to have the overpayment refunded. These facts appear clearly from the special findings. But from these same findings it also appears that on Dec. 20th, 1905, the parties made an oral agreement modifying the contract of May 27th, 1905. The findings show that this agreement was not executed, and the judgment directs the payment of some $7,656.53 in execution of the contract of May 27th as modified. But these agreements were all made and were to be performed in the State of California, and Sec. 1698 of the Civil Code of the State of California provides:

> "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise."

And Section 1661 of said Code defines an executed contract as follows:

> "An executed contract is one, the object of which is fully performed. All others are executory."

Under these statutory provisions it is impossible to maintain an action on a written contract, as modified by a subsequent oral agreement, if the breach charged is a breach of one of the stipulations of the oral agreement. This is definitely settled in this State and the rule of law clearly stated in the recent case of Pearsall v. Henry, 153 Cal. 314. In that case the Court said (p. 325):

> "'A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise'. According to Section 661 (1661) of the Civil Code, an executed agreement is one, 'the object of which is fully performed. All others are executory'. If the agreement of April 23, 1901, is to be regarded as a mere modification or alteration of the then existing agreements, it must be conceded that it was not executed within the meaning of Section 1698, and is therefore not now enforceable. *An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligations of both parties in order to bring the modification within the terms of the statute.* (Henehan v. Hart, 127 Cal. 657, 60 Pac. 426; Thompson v. Gorner, 104 Cal. 168, 43 Am. St. Rep. 105, 37 Pac. 900; Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060; MacKenzie v. Hodgkin, 126 Cal. 591, 77 Am. St. Rep. 209; 59 Pac. 36; Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.)"

The decisions of the Supreme Court of California interpreting the State statutes are, of course, binding on the Federal Courts in an action at law where jurisdiction is based on diversity of citizenship. But,

apart from this, the statute has received a similar interpretation in the State of South Dakota, where it has been adopted.

In the case of Mettel v. Gales, 82 N. W. 181, the facts were as follows: Mettel agreed to sink an artesian well 4½ inches in size and Gales agreed to pay for the well $1500. The contract also provided that Mettel might, under certain circumstances, sink a well 3 inches in size, but, that in the event that the smaller well was put down the price was to be $950. This contract was in writing. Mettel drilled 830 feet and put in 795 feet of 4½ inch casing. When the work had reached this stage, Gales and Mettel made an oral agreement which provided that 140 feet of the 4½ inch casing installed should be taken out and a 6 inch casing substituted and the last 35 feet finished in 3¾ inches perforated casing. Mettel fully performed his part of the contract as modified, put in the 140 feet of 6 inch casing and the 35 feet of 3¾ inch casing. Gales helped him do the work and paid him $1225. The action was brought to recover the balance of $275. The judgment of the lower Court was given in favor of Gales and the Supreme Court reversed this judgment, saying (p. 183):

> "The remaining point is whether the Court committed error in refusing to give the following instruction, proposed by counsel for appellant at the conclusion of all the testimony: 'The jury are instructed to return a verdict for the defendant, because the contract in this case, being in writing, cannot be altered except by a contract in writing, or by an executed oral

agreement; and there is no evidence of either a written consent to alter or of an executed oral agreement to alter it'. Without giving the testimony of the various witnesses in detail, it is safe to conclude that there is substantial evidence to sustain every allegation of the complaint relating to the alleged subsequent verbal agreement modifying the original written contract. As the evidence shows that it was impossible to use a continuous string of 4½ inch casing from the top to the bottom of the well, respondents had a clear right, under the written contract, to use 3 inch casing, and to collect, in that event, $950 for the well. While there is testimony tending to prove that appellant, instead of having the well encased with this 3 inch material, permitted the use of some 6 inch and 3¾ inch wrought-iron piping, and orally agreed to accept the same, it does not affirmatively appear that he agreed to accept the well, and pay the sum of $1500 therefor. If we assume that he did in a formal manner orally accept the well as an entirety and agree to pay $1500 for it, his failure to perform in that regard defeats this action, because 'a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise'. Comp. Laws, Sec. 3593. 'An executed contract is one, the object of which is fully performed. All others are executory'. Id. Sec. 3576. An executed contract has the qualities of a chose in possession, while an executory contract is nothing but a chose in action,—the mere right to something arising from a contract, express or implied, which cannot be enforced without resort to legal process. In 11 Am. & Eng. Enc. Law, p. 582, the author says: 'An executed contract is one in which the object of the contract is performed. A debt paid is a contract executed'. Bouvier defines such contract thus: 'Executed contracts are those in which nothing

remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made; as, where an article is sold and delivered, and payment therefor is made on the spot. Executory contracts are those in which some acts remain to be done,—as when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest, payable at a future day'. At page 824 (1st Ed.) 3 Am. & Eng. Enc. Law, it is stated that: 'Executed contracts are not properly contracts at all. The term is used to signify rights in property which have been acquired by means of contract. The parties are no longer bound by a contractual tie'; and the following illustration is given: 'Thus, a man agrees to buy a horse of another, pays the price, and takes the horse to his own stable. Here a contract has taken place, but the buyer has become the owner of the horse, and the seller has become the owner of the money. The transaction is at an end; and the contract is executed'. Chief Justice Marshall, speaking for the United States Supreme Court in Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162, uses the following language: 'An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant'. According to the common law doctrine, parol evidence was not admissible to alter a written executory contract, and our Legislature, actuated by principles of public policy, has made the rule statutory. In the following cases it was held that parol evidence of an executory contract was inadmissible, under the statute, to vary the terms of a written contract: Manufacturing Co. v. Galloway, 5 S. D. 205, 58 N. W. 565; Lewis v. Railroad Co., 5 S.

> D. 148, 58 N. W. 580; Strunk v. Smith, 8 S. D. 407, 66 N. W. 926; Bank v. Kellogg, 4 S. D. 312; 56 N. W. 1071; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82. Our conclusion, therefore, is that the motion of counsel to direct a verdict for appellant should have been granted. The judgment appealed from is reversed, and the case remanded for further proceedings not inconsistent with the views herein expressed."

There is no doubt that under the statutes of this State the oral agreement on which the judgment in this action is based is invalid and could not, as matter of law, affect the rights of the parties as defined by their written agreement. Indeed, under general rules of law, the same result would ensue in this particular case, for the original written contract was a contract within the statute of frauds and was required by that statute to be in writing. In Marshall v. Lynn, 6 M. & W. 109, the Court held that—

> "The terms of a written contract for the sale of goods, falling within the operation of the Statute of Frauds, cannot be varied or altered by parol; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing."

And in Swaine v. Seamens, 9 Wall. 254, 272, the Court said:

> "The better opinion is, that a written contract falling within the Statute of Frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of Marshall v. Lynn *(supra)*, is that the terms of a contract

> for the sale of goods falling within the operation of the Statute of Frauds cannot be varied or altered by parol."

It is, however, true that when the invalidity of the subsequent oral agreement arises from the operation of the Statute of Frauds, and not from the direct operation of a statute such as Sec. 1698, Civil Code, it is not necessary that the oral agreement be fully executed. The Statute of Frauds, being the basis on which rests the rule declaring such oral modifications invalid, the operation of the statute and the rule based thereon may be avoided in equity when there has been such part performance of the oral modification as would, according to equitable principles, operate to take an oral contract out of the Statute of Frauds.

But such relief is purely equitable in its nature and cannot be granted even in equity when the action is brought on the original written agreement.

In Leake on Contracts (5th Ed.) p. 568, the rule is laid down as follows:

> "Part performance of the verbal agreement may take it out of the statute, and admit it to proof in answer to the claim to execution of the original written agreement. (Olley v. Fisher, 34 C. D. 367; 56 L. J. C. 208). But a plaintiff having claimed upon the written agreement is not entitled to fall back upon the variation so proved, unless the defendant consents. (Clowes v. Higginson, 1 V. & B. 524.)"

The present action is, however, one at law, and Benton can obtain no equitable relief on this side of

the Court. But, even if equitable relief could be granted in this action, and even if the sole defense rested on the Statute of Frauds, still Benton could not make out a case of part performance sufficient to avoid the operation of the statute in equity. This Court will recall that *no act of part performance was done under the oral agreement for modification which was not called for and equally referable to the written contract of May 27th.* And it is a settled rule of equity that in order to constitute a part-performance sufficient to avoid the operation of the Statute of Frauds, the acts claimed to constitute part-performance must not be such as can be referred to the execution of any existing contract in writing, but must be inconsistent with such written contracts as may exist.

Speaking on this subject, Sir James Wigram said:

> "It is, in general, of the essence of such an act (of part performance) that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract."
>
> Dale v. Hamilton, 5 Hare 381.

In Byrne v. Romaine, 2 Edw. Ch. 445, 446, it was claimed that acts referable to an existing written agreement between the parties were actually done in part performance of a subsequent parol agreement and on this basis the plaintiff sought to avoid the operation of the Statute of Frauds. The Court held the statute applicable, saying:

"Acts of part-performance, in order to have this effect, must be solely applicable to the parol agreement."

See,

Wheeler v. Reynolds, 66 N. Y. 227.
Campbell v. Id., 11 N. J. E. 268.

In this case neither party did a single thing not called for by the written contract of May 27th and no case of part-performance could be made out in a Court of Equity even if such a Court would entertain an action, the avowed purpose of which was to recover for goods sold, some $10,000 in excess of the value, by taking advantage of the errors and mistakes of persons who estimated the amount sold and delivered. However, this discussion is unnecessary because of the express provisions of Sec. 1698 C. C., but we have gone into the matter merely for the purpose of showing that we are not endeavoring to evade a liability imposed by general rules of equity on account of a peculiar statute in force in this jurisdiction.

During the trial of this cause, Kelley & Co. repeatedly objected to the introduction of any evidence respecting the oral modification of the contract of May 27th, 1905, not only on the ground that such evidence was not within the issues presented by the pleadings, but also on the ground that the evidence offered was incompetent, irrelevant, and immaterial. Kelley & Co. also made a motion to strike out this evidence on similar grounds. The questions,

objections, rulings and exceptions are embodied in the Assignments of Error, Tr. pp. 138, 142. The questions of law already discussed—though in a somewhat different connection—apply to the errors here assigned, and we feel that it would be but a waste of time to reiterate these propositions of law in this connection, but merely refer to these errors lest a waiver might be implied from a failure to mention them expressly. If, however, we are correct, as we believe to be the fact, in the view we have taken of the broader aspect of the case, these errors become immaterial. But if, for any reason, the broad view cannot be adopted, these errors of themselves will necessitate a new trial.

However, in conclusion, we submit that the judgment of the lower Court should be reversed and the cause remanded, with directions to enter judgment in favor of Kelley & Co. on the findings filed.

Respectfully submitted,

CORBET & SELBY,

J. F. BOWIE,

Attorneys for Plaintiffs in Error.

No. 1710

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as copartners, doing business under the firm name and style of W. E. KELLEY & COMPANY,

Plaintiffs in Error,

vs.

T. H. BENTON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

PERRY & DAILEY,
Attorneys for Defendant in Error.

Filed this ..... day of January, 1910.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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The statement of the case presented by the plaintiffs in error, while substantially correct, to the extent that it goes, omits some facts that are proper and important for the cognizance of this Court in the consideration of this case. For that reason we will endeavor to make a brief statement of the facts of the case as it is presented to this Court.

For convenience we will hereafter refer to the defendant in error herein as the plaintiff, and to the plaintiffs in error herein as the defendants.

The plaintiff commenced this action in the Superior Court of the State of California, in and for the County of Shasta, on June 5, 1906, alleging, substantially, that on the 27th day of May, 1905, the parties to the action entered into a written contract for the sale and purchase of all of the cut of plaintiff's mill for 1905, of grades of #2 shop and better. A copy of the contract was annexed to the complaint. It was alleged that in compliance with that contract plaintiff delivered to defendants 2,297,-175 feet of lumber, and that thereby defendants became indebted to the plaintiff in the sum of $55,-132.20, upon which defendants had paid $45,164, leaving unpaid a balance of $9,968.20.

On June 18, 1906, the defendants appeared in said action and filed a petition for the removal of the cause to the United States Circuit Court. On June 25, 1906, the defendants interposed a demurrer to the complaint which was subsequently overruled, and on February 27, 1907, the answer of the defendants, which had been verified by Burke Corbet, attorney for defendants, February 25th, 1907, was filed in the United States Circuit Court.

The answer admitted the making of the contract, but denied that plaintiff had delivered to defendants to exceed 1,750,268 feet of lumber of #2 shop and better, and 10,493 feet of "shorts", and denied that defendants had received of plaintiff more than that

amount of lumber "under the terms of said contract " or otherwise".

The defendants further set up a counter claim alleging the making of the contract, and setting forth a copy thereof, and that under the contract plaintiff delivered to defendants 1,750,268 feet of lumber of #2 shop or better, and 10,493 feet of shorts. That by the terms of the contract defendants were to ship from their yards, within thirty days after receipt of lumber from the plaintiff, and if not so shipped, an estimate of the lumber on hand was to be made and money advanced equal to the values of the lumber not yet shipped, but that such a settlement was not to be a final settlement, but was subject to adjustment after final inspection of the lumber when it was shipped out of the yards. That in January, 1906, defendants had a large quantity of lumber in the yards; that plaintiff requested defendants to make an estimate and payment; that defendants did make an estimate, *and on the 12th day of January, 1906, paid plaintiff $20,000 based* on that estimate.

It was further alleged that prior to that date defendants had paid $29,364, making total payments of $49,634.

That afterwards all the lumber was shipped out, and it was for the first time ascertained that the total amount of lumber delivered by plaintiff was 1,750,268 feet of #2 shop and better, and 10,462 feet of shorts. That the total liability of defendants amounted to $42,387.92, and that defendants by

the payment above specified and by reason of the fact that they were entitled to a discount of $601.09 had overpaid the plaintiff to the extent of $6,976.08.

The Court found that all of the lumber was not shipped out until after issue had been joined in the action. The last shipment having been made in March, 1907, nine months after the commencement of the action and one month after the filing of the answer of defendants therein (Tr. p. 47). It will be observed from the examination of the contract under which the lumber was delivered to the defendants that while it called for the delivery of certain grades of lumber only, the method of ascertaining those grades was left indefinite. It was provided that Mr. Benton should have the privilege of always keeping an inspector on the ground to keep check on the inspector of the defendants. It seems to be admitted, and the Court found as a fact, that the plaintiff delivered to the defendants, at their yards, lumber largely exceeding the amount for which recovery is made in this case. The question arose as to how much of that lumber was of #2 shop and better. This controversy having arisen, an arrangement was made for the grading of the lumber, or the ascertainment of the percentage thereof which came within the grade of #2 shop and better. *This was not a modification of the contract or a variance from its terms. It was not an arbitration or award, and was not the creation of any new liability to plaintiff on the part of the defendants.*

It was admitted that lumber had been wrongfully rejected by the defendants as not coming within the grades of #2 shop or better (test. of deft. Daugharty, p. 105).

The lumber had been delivered between June 25th and November 22nd, 1905 (Tr. p. 46, Finding 2), and a large quantity remained in the yards of the defendants. There was a dispute or a difference between the parties as to the amount of lumber that had been graded out as below the grades #2 shop or better (test. of Benton, Tr. p. 72). Mr. Benton claimed that in the grade segregated by defendants as #3 shop there was lumber that ought to be put in the higher grade of #2 shop or better, and it was to settle this difference that the graders were selected. Defendants had been unable to get cars to ship the lumber out (test. of deft. Daugharty, Tr. p. 107), and it was then agreed between defendants and the plaintiff that upon that ascertainment or estimate a final settlement of the liability of defendants to plaintiff under the contract should be made. The estimate was made, the percentage of the grades determined, and after this ascertainment, determination and settlement of liability Mr. Benton treating the matter as settled and determined withdrew his inspector from the yard (test. of Clifton, Tr. p. 104, and Warren, Tr. p. 119), and the transaction was treated as closed, except that defendants had not made full payment upon the liability thus determined, as they were bound to do, not only by this subsequent arrangement but by the contract as originally entered into.

BILL OF EXCEPTIONS AND ASSIGNMENTS OF ERROR.

The only evidence in this case which is brought up to this Court by the record is the evidence on which paragraphs 4, 5 and 6 of the Findings of Fact are based (Tr. p. 55). It will be observed that these findings all relate to the oral agreement of the ascertainment of the amount of lumber delivered under the contract and in the yards of defendants on January 11th and 12th, 1906, and the liability of the defendants to pay the plaintiff accordingly.

Defendants have made twenty-two assignments of error, all substantially directed to the same point, and all based upon the admission of evidence in relation to the appraisement or ascertainment of the percentage of grades of lumber delivered up to January 11th and 12th, 1906, and the refusal of the Court to strike out the evidence thus admitted, and the making of findings to conform to that evidence, and the findings of fact upon the evidence and determining and declaring defendants' liability accordingly. All of the assignments of error go to the one proposition that the evidence introduced by the plaintiff to the effect that an ascertainment or estimate of the percentage of grades of lumber delivered under the contract had been made by agreement between the parties, and that by that agreement it was settled and determined that it should be for a final settlement of the extent of the liability of the defendants so far as grades and quantity of lumber are concerned.

Argument.

The arrangement for the grading and estimating of the lumber delivered was not an arbitration or award, and was not the creation of any new liability to plaintiff on the part of the defendants.

Methodist Episcopal Church v. Seitz, 74 Cal. 291;

Foster v. Carr, 135 Cal. 83.

If the Court was correct in its conclusion that the oral agreement and adjustment in January, 1906, fixed and determined the amount and the grades of the lumber delivered by plaintiff to the defendants, and the liability of defendants to plaintiff, then the Finding 3 which relates to the shipment of the lumber subsequent to the commencement of the action, and subsequent to the filing of the answer of defendants, and subsequent to the time Benton withdrew his inspector and treated the matter as settled and determined, is an immaterial finding.

Where the facts found by the Court are such as might authorize different inferences, it will be assumed that the one drawn by the trial Court was one that would uphold rather than defeat the judgment.

Nevills v. Moore Min. Co., 135 Cal. 561.

Where findings are capable of different constructions, the construction should be given which will uphold the judgment.

Brison v. Brison, 90 Cal. 323;

Krasky v. Wollpert, 134 Cal. 338;

Paine v. San Bernardino Val. Tra. Co., 143 Cal. 654.

Where a special finding is inconsistent with the other findings and the judgment, and also with the pleadings and the admissions therein contained, it is not ground for the reversal of the judgment but will be disregarded as immaterial to the case as made by the pleadings.

Machado v. Santa Monica, 135 Cal. 354.

Findings are to be read and construed together, and liberally construed in support of judgment, and, if possible, are to be reconciled so as to prevent any conflict upon material points.

People's Home Sav. Bank v. Rickard, 139 Cal. 285.

Necessarily finding number 3 is inconsistent with findings 4, 5 and 6, as it relates to matters arising after the whole transaction had been settled and adjusted according to findings 4, 5 and 6, and after issue joined in the action.

Disregarding the finding number 3, the only question that remains is the question of whether or not the case presents any variance between the pleadings and proof, and if it does present such variance, whether or not the variance is such as to justify a reversal of the judgment.

Section 469 of the Code of Civil Procedure provides:

> "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. *Whenever it appears*

that a party has been so misled, the Court may order the pleading to be amended upon such terms as may be just."

Section 470 of the Code of Civil Procedure provides:

"Where the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

We do not believe that there is any substantial variance between the pleadings and the proofs. The contract sued upon, is the contract upon which the recovery was made, *and the proofs which were introduced to establish the delivery of the lumber were no more a variance than would have been the introduction of an admission made by the defendants to the effect that they had received the amount of the lumber alleged to have been delivered under the contract.*

"Where the only difference between the agreement pleaded and the proof is a difference in the rule by which compensation is to be made, and if proof corresponds with the rule for measuring compensation, which is pleaded by appellant himself, the proof should not be held to amount to a fatal variance."

Griffith v. Ridpath, 80 Pac. Rep. 820.

"It is only necessary that the evidence substantially support the allegations of the bill; and relief will not be denied because the evidence fails to support the bill in some unimportant particular."

Ency. of Evi., Vol. 13, p. 639.

The controversy between the plaintiff and defendants was based upon the quality of the lumber delivered; defendants admittedly had been rejecting lumber which plaintiff claimed should be included in the grades called for by the contract. It was to settle this controversy that appraisers were appointed. When that controversy had been settled both parties accepted the decision of the appraisers as to the grades, and the liability of the defendants was fixed and determined.

Defendants in their answer set up the appraisement and settlement, but alleged that it was not a final ascertainment or determination. The Court found that it was a final ascertainment and determination, and fixed the extent of the defendants' liability. The question of whether or not it was a final ascertainment and determination was tried in the lower Court, Mr. Benton (Tr. pp. 60, 67, 68), Mr. Ogburn (Tr. pp. 76, 77), Mr. A. F. Smith (Tr. pp. 79, 81), Mr. Oliphant (Tr. p. 89) and Mr. Lowdon (Tr. pp. 92, 93, 95), all testified that it was a final settlement, and was so understood to be, between the parties. On behalf of the defendants, Mr. Clifton testified that he thought the object of the settlement was to settle how much #2 shop or better lumber was in the rejects (Tr. p. 102); Mr. A. H. Daugharty, one of the defendants, testified that it was not to be a final settlement (Tr. p. 106), Mr. Warren testified that a final settlement was not talked about at the

time (Tr. p. 115); and it was stipulated that if the witness Mrs. Larsen were present she would testify that it was her understanding from the conversation at that time that it was not for the purpose of effecting a settlement, but merely for the purpose of effecting an estimate of the lumber on hand, for the purpose of the grade that came within the actual contract.

It was also stipulated that if Mr. Ruff were present as a witness on behalf of plaintiff, that he would testify that Mr. Clifton told him at the time of the appraisement that it was being made for a full and final settlement, and that there would be no more grading of the lumber thereafter (Tr. p. 122).

The question was fully gone into on the trial of the case so that there can be no possibility that the defendants were misled to their prejudice in maintaining their defense upon the merits of the case.

The provisions of the Code of Civil Procedure above cited and the cases construing and applying these provisions are clear to the effect that it must affirmatively appear that the adverse party has been actually misled to his prejudice in maintaining his action or defense upon the merits, before a variance will be deemed material. Whenever it appears that the adverse party has been so misled, the Court may order the pleading to be amended upon such terms as may be just. If the variance is not material, in that the adverse party has not been misled to his prejudice, then the Court, under Section 470 of the

Code of Civil Procedure, may direct the fact to be found according to the findings, or may order an amendment without cost.

> "Where there is enough in the bill to warrant the relief, and the defendant could not have been taken by surprise, the decree should not be reversed on the ground that the *allegata* and the *probata* do not sufficiently agree to justify it."
>
> *Moore v. Crawford*, 130 U. S. 122.

> "A person cannot sue upon one cause of action and recover upon another; but that does not apply where the cause of action is not proved, as alleged, yet a liability is established within the scope of the subject as stated, and everything in respect thereto is fully litigated so that an amendment might properly be granted conforming the pleadings thereto; nor militate against the rule that a Court of equity having taken jurisdiction of the subject matter for one purpose, which is not fully established on the trial, a liability notwithstanding being established in a full hearing, within the scope of such subject, the Court will retain the case and grant such relief as is within its jurisdiction to afford."
>
> *Harrington v. Gilchrist*, 121 Wis. 127; 99 N. W. 909-915.

The variance to be a material one, must be as to a matter of substance going to the very right of the cause.

13 Ency. of Evi., 645-6.

Citing:

Brown & H. Co. v. Ligin, 92 Fed. 851;
Eastlick v. Wright, 121 Cal. 309.

If it is claimed that the adverse party has been misled by the variance, it must be made to appear to the satisfaction of the Court that he has been so misled.

13 Ency. of Evi., 648.

Citing:

Plate v. Vega, 31 Cal. 383;
Began v. O'Reilly, 32 Cal. 11;
Stout v. Coffin, 28 Cal. 65;
Hitchcock v. McElrath, 72 Cal. 565;
Cockins v. Cook, 41 Pac. (Cal.) 406;
Moore v. Douglas, 132 Cal. 399;
North Star Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593.

Where the evidence sustains the case made by the pleadings so that another action could not be maintained on the same evidence offered in support of the pleadings therein, there is no material variance.

13 Ency. of Evi., 650.

Citing:

Reed v. State, 16 Ark. 499;
Frazer v. Smith, 60 Ill. 145;
United States v. Murphy, 27 Fed. Cas. No. 16074.

The rule that the allegations and proof must correspond is intended to answer the double purpose of

distinctly and specifically advising the opposite party of what he is called upon to answer, so as to enable him to properly make out his case and to prevent his being taken by surprise in the testimony at the trial, and of preserving an unerring record of the cause of action as a protection against another proceeding based upon the same cause.

Ency. of Pl. and Pr., Vol. XXII, pp. 537-8.

In the federal courts the practice with regard to variances is to follow the rules which prevail in the state courts.

Wilson v. Haley Live Stock Co., 155 U. S. 39;
Liverpool, etc., Insce. Co. v. Gunther, 116 U. S. 113;
Pope v. Allis, 115 U. S. 363;
Hoge v. Magnes, (C. C. A.) 83 Fed. Rep. 355;
Cincinnati St. R. v. Whitcomb, (C. C. A.) 66 Fed. 915;
Wittkowski v. Harris, 64 Fed. Rep. 712.

Statutory and code provisions with respect to variances, being designed to correct the evil of the old system, should be liberally construed.

Began v. O'Reilly, 32 Cal. 11.

The difference between the common law and the code practice is that under the latter there is a new method of determining the elements and consequences of a variance, under which the *prima facie* incoherence of the pleading and the evidence introduced in support of it does not settle the materiality

of the variance, but proof is necessary upon the question whether there is an incorrect allegation in the pleading which is actually misleading.

Began v. O'Reilly, 32 Cal. 11;
Plate v. Vega, 31 Cal. 383;
Zugler v. Wells, 28 Cal. 263;
Peter v. Foss, 20 Cal. 586.

And that an amendment is readily allowed where a material variance will be cured thereby, while if the variance is immaterial the Court may direct the facts to be found according to the evidence.

Tryon v. Sutton, 13 Cal. 490;
Connolley v. Peck, 3 Cal. 75.

> "Even if the variance between the allegations of the complaint and the proofs were such as to have actually misled the defendant to her prejudice in maintaining her defense upon the merits, they could not be held to be such as to constitute the case one of failure of proof under section 471 of the Code of Civil Procedure, and full and adequate remedy could have been afforded both parties by an order of amendment of the complaint upon such terms as might be just. (Code Civ. Proc., Sec. 469.)"

Politz v. Wickersham, 150 Cal. 238.

No variance is material unless it has misled the adverse party.

Abner Doble Co. v. Keystone, etc., Co., 145 Cal. 490.

In the case of *Cobb v. Doggett,* 142 Cal. 142, it appears that accompanying the assignment sued on,

there was a contemporaneous agreement in writing materially modifying its effect, which was offered in evidence by the plaintiff, but on the objection of defendant excluded; and it is urged by the appellant that this ruling was erroneous. The Court said:

> "The contract thus offered to be proved did indeed vary from the contract alleged; which was a simple assignment. But the variance was not of a character to mislead the defendant, and was therefore immaterial. Nor indeed was objection made on that ground."

To the same general effect are:

Antonelle v. Lumber Co., 140 Cal. 309;

Miller v. Ballerino, 136 Cal. 366;

Carter v. Rohdes, 135 Cal. 46;

Lyles v. Perrin, 134 Cal. 417.

> "The defendant does not make it appear that he was in any way misled to his prejudice thereby."

Moore v. Douglas, 132 Cal. 399.

See:

Stockton, etc., Wks. v. Glens, etc., I. Co., 121 Cal. 167;

Holt v. Holt, 120 Cal. 67;

Santa Monica L. & M. Co. v. Hege, 119 Cal. 376;

Herman v. Hecht, 116 Cal. 553;

Amador G. Mine Ltd. v. Amador G. Mine et al., 114 Cal. 346;

Bode v. Lee, 102 Cal. 583;

Clark v. Chapman, 98 Cal. 110;

Carher v. Baldwin, 95 Cal. 475.

In the last case the complaint alleged performance of contract for services of attorneys. Proofs showed partial performance of services and waiver of remainder.

Kurtz v. Forquer, 94 Cal. 91.

This was an action on bond. The bond introduced varied from bond described by omission of names of signers. The Court said:

> "It would be a vain thing to reverse the judgment in order to allow the plaintiff to make an amendment to his complaint which would in no material way change the positions of the parties or the merits of the case."
>
> "The object of the suit was to recover the difference between what the agent reported he had purchased the stock for, and which plaintiff had paid the agent, and the price which, as plaintiff afterwards discovered, the agent had actually paid. An examination of the record shows quite conclusively that the defendant was not misled by the variance. A full defense was made, as though the complaint had accurately stated the facts."

Sommer v. Smith, 90 Cal. 260.

> "There was probably a variance in proving a reduced rent without pleading the agreement of reduction, but under the circumstances it could not have misled the defendant to his prejudice, and therefore it is to be disregarded. (Civ. Code Proc., Sec. 469.)"

M. E. Church v. Seitz, 74 Cal. 287.

Hitchcock v. McElrath (72 Cal. 565), was an action to recover for wrongful conversion of certain

shares of the capital stock of a corporation. The complaint averred, generally, that plaintiff loaned the stock to defendant and that he converted it to his own use. Evidence showed that the stock was loaned for the special purpose of being used by the defendant to raise money to pay and take up a promissory note of which defendant was maker and the plaintiff the accommodation endorser. The answer denied that plaintiff was the owner or that defendant had borrowed it, and averred that he had bought it from plaintiff. Held that the variance was immaterial, as under the pleadings the defendant could not have been misled to his prejudice.

A variance is immaterial where it would not affect the result.

Davis v. Baugh, 59 Cal. 568.

Pleading an express promise to pay and proving an implied promise, does not constitute a variance.

De La Guerra v. Newhall, 55 Cal. 21.

See:

Quackenbush v. Sawyer, 54 Cal. 439;

Pogue v. Bace, 4 Cal. App. Rep. 406.

"The notice is, indeed, incorrect in stating as one of the terms of the contract that the claim was based upon a *quantum meruit* instead of upon a special promise to pay a fixed amount; and this, doubtless, as a matter of pleading would constitute at common law a material variance, though hardly under existing practice. (Code Civ. Proc., sec. 469.)"

Star M. & L. Co. v. Porter, 4 Cal. App. Rep. 470.

The findings of fact embraced in paragraph 3 of the findings, are as to probative facts. The ultimate facts are disposed of in the findings of the Court to the effect that the plaintiff and defendants entered into a contract for the purchase and sale of the lumber, at an agreed price as to the various grades; that 2,779,276 feet of lumber was delivered in accordance with the contract, that the grades were determined by agreement between the parties, and that by such determination and agreement the defendants became liable to plaintiff in the sum for which judgment was given. These ultimate facts are sufficient to sustain the judgment.

> "But when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the findings, can be overcome by the principal finding."
>
> *Smith v. Acker*, 52 Cal. 217.

The probative facts found must be disregarded in the consideration of this appeal.

> *Pio Pico v. Cuyas*, 47 Cal. 174.
>
> "The rule has long been settled that, 'when the ultimate fact is found no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact' (*Smith v. Acker*, 52 Cal. 217, *Pio Pico v. Cuyas*, 47 Cal. 174.)"
>
> *Gill v. Driver*, 90 Cal. 72.

These cases were cited and approved in *Rankin v. Newman* (107 Cal. 602, 608), and again in *Commer-*

cial Bank v. Redfields (122 Cal. 405), and *Brown v. Mutual Reserve Fund Life Assn.* (137 Cal. 278), where it was said:

> "But the ultimate facts having been found against the plaintiffs, no finding of probative facts will be permitted to control. (Citing cases.)"

See, also, *Wood v. Pendola,* 78 Cal. 287.

The rule above cited was followed and the cases above cited were cited as authority in the case of *Vasey v. Campbell* (4 Cal. App. Rep. 451). In that case the findings of ultimate facts were in favor of the plaintiff, who obtained a judgment for the recovery of certain personal property involved in the action. Certain probative facts were found which, if entitled to consideration on appeal, would have justified a judgment for the defendant, and the Court said:

> "The finding of ownership and the right to possession of the property is the finding of an ultimate fact upon which the right to recover depends. * * * Findings as to ultimate facts control as against findings of probative facts. (Citing cases.) Findings should be construed so as to uphold rather than defeat the judgment. (Breeze v. Brooks, 97 Cal. 72.)
>
> "It may be conceded for the purpose of this case, that if it had been found that the property sued for was intended by plaintiff to be used in violation of the gambling laws of the state, and that it could not be put to any legitimate use, replevin would not lie for the recovery thereof [citing authority], but applying the principles above set forth concerning the interpretation of

findings, we have no such case. In the face of the express finding that plaintiff is the owner and entitled to the possession of the property sued for, we cannot infer from the finding that the property is commonly used for unlawful gambling, and that a part was being so used when seized by defendant's order, that plaintiff ever so used it, or intends to so use it, or that it cannot be used for lawful purposes. The finding that the articles are commonly used for unlawful gambling purposes suggests the inference that plaintiff seeks the possession of the property with the object of using it for such purposes, and together with other evidence would have justified a finding to that effect by the trial Court. But we cannot indulge in such inferences in the face of the express finding of ultimate fact, that plaintiff is entitled to the possession of the property sued for."

In *Forsythe v. Los Angeles Ry. Co.* (149 Cal. 569, 575), it was said:

> "But, in the second place, the general rule is that the finding of the ultimate fact prevails in support of the judgment, notwithstanding a finding of a probative or evidentiary fact, which tends to show that the ultimate fact was found against the evidence. A finding of probative facts will not invalidate the finding of an ultimate fact unless the latter is based on the former, and is entirely overcome thereby, and unless, also, it appears that these findings of probative facts dispose of all the facts involved in the pleading, and that the facts found constitute all the facts in the case."

The contention of plaintiffs in error that the ascertainment of percentages of grades of lumber and final adjustment of the question as to the amounts of

lumber delivered, amounted to an unexecuted oral agreement for the modification of a written contract cannot be sustained.

An examination of the transcript will show that, first, the arrangement was not a modification of the contract at all, and second, that it was put in writing by the parties to this action, through their authorized agents (Tr., pp. 64, 66).

By the terms of the agreement of May 27, 1905, the lumber was to be shipped by W. E. Kelley & Company within 30 days after delivery, and payment made therefor 60 days after shipment, or 2% off for cash, at the option of Mr. Benton (p. 5, Tr.).

It was clearly the intention of the parties to said agreement to provide for payment for the lumber delivered in case the same was not shipped within said period of 30 days after delivery. For such a contingency the said agreement provided that on the demand of Mr. Benton for payment, an estimate should be made *by W. E. Kelley & Company* of the amount of lumber that had been delivered under the contract, and payment made on this estimate; but that the settlement made on this estimate should not be final (p. 5, Tr.), and for the very obvious reason that Mr. Benton would not accept as final the mere estimate made by W. E. Kelley & Company alone. The clear intention of the parties as expressed by said agreement was that the lumber should be paid for as soon as the amount delivered had been ascertained, if the lumber was not shipped within 30 days.

A considerable part of the lumber had not been shipped within 30 days, and, in addition to this, a controversy had arisen between the parties as to the grading of the lumber.

The said contract of May 27, 1905, provides that " all grades mentioned in this contract are the same " as per rules adopted April 1, 1903, by the Cal. Sug. " & W. P. Agency", but contains no provision as to who shall determine any controverted question that may arise relative to the particular grade of lumber delivered; nor does it contain any provision at all as to who shall do the grading. The nearest approach to such provision is the following:

" I am to always have the privilege of keeping an " inspector on the ground to keep a check on your " inspector, if I desire."

Mr. Benton claimed that W. E. Kelley & Company were not grading the lumber properly, and a lot of 2 shop and better had been put with lumber of a lower grade. Mr. Benton was insisting on a settlement and a determination of the controverted question as to the amount of lumber delivered that was within the grades called for in the agreement (pp. 58-59-60).

It was finally agreed that each side appoint a grader and these two graders would go through all of the lumber in the yard at the railroad that had not already been graded by W. E. Kelley & Company as #2 shop and better, and determine how much lumber of the grades called for in said agreement had

been delivered. At the same time it was agreed that if the said two graders could not agree on the grade of any particular boards the same should be put aside, and if the disputed boards constituted a considerable amount the two graders were to appoint a third grader for such lumber, whose grading would be final (p. 72).

This was done, and the two graders Mr. Clifton for W. E. Kelley & Company, and Mr. Ruff for Mr. Benton, graded the lumber and made their written report (pp. 64-65-66). After the report had been made, it would have been futile for Mr. Benton to have called for an estimate from W. E. Kelley & Company for the purpose of having payment made to him. Under the terms of the agreement payment for the 2 shop and better lumber that had been delivered was due, for it had not been shipped within 30 days after delivery.

The purchase price of the lumber being due, and all controverted questions as to the grades and amounts of lumber delivered having been settled, nothing remained to be performed by the parties but for W. E. Kelley & Company to pay to Mr. Benton the balance due.

There was no modification of the contract relative to the manner of grading the lumber, for the agreement was silent upon this point. There was also no modification of the agreement relative to the time of payment, for the intention of the parties, as gathered from the agreement itself, was that the lumber

should be paid for upon ascertainment of the amount delivered, if it was not shipped within 30 days. The estimate provided for this payment, leaving in abeyance the final determination of the percentages of grades. This was determined by the graders selected by the respective parties.

The parties who made this adjustment, ascertainment and determination were admittedly the authorized representatives of the parties to the contract, and they reduced the ascertainment of percentages of grades and the total amount of lumber to writing and signed it. There was no longer any factor to be ascertained or determined in fixing the full extent of the liability of defendants, and under a fair interpretation of the contract Mr. Benton had the option of waiting 60 days for payment or immediately demanding payment, less 2% for cash.

In this view of the case it becomes unnecessary for us to indulge in an extended criticism of the arguments advanced by counsel for plaintiffs in error, or discussion of the non-applicability of the authorities cited by them.

While there seems to be some difference in the constructions placed upon statutes reading substantially as Section 1698 of the Civil Code of California reads, the construction placed upon that section of our Civil Code by the Supreme Court of California does not uphold the argument made by counsel for plaintiffs in error. It is pointed out in *Page on Contracts*, that the construction given by our Su-

preme Court of that particular section is at variance with the construction by the Supreme Court of South Dakota of a similar statute, in the case of *Mettel v. Gales,* cited by counsel. The difference is in regard to the construction is as to what constitutes an unexecuted oral agreement.

> "Under such statutes there is a conflict of authority as to what constitutes an executed contract. An agreement between an Insurance Company and a policyholder after a loss fixing the amount of the liability of the Company, is not a 'modification' of the policy within the meaning of the statute forbidding executory oral modifications of contracts." (Citing: *Stockton, etc., Works v. Insurance Company,* 121 Cal. 167.)
>
> *Page on Contracts,* Vol. 3, Sec. 1350, p. 2093.

An examination of the case referred to by the text writer, will show that it is clearly at variance with the contentions of counsel for plaintiffs in error.

The first count of the complaint in that action alleged an oral agreement for an adjustment of a contractual liability, quite similar to the adjustment made in this case. We quote from the opinion of the Supreme Court in the final decision of the case:

> "5. It is claimed by appellant that the contract sued on, conceding that it was made, was an unexecuted parol modification of a written agreement, and hence void. (Citing Civ. Code, sec. 1698; Thompson v. Gorner, 104 Cal. 168; 43 Am. St. Rep. 81; Benson v. Shotwell, 103 Cal. 167; Erenberg v. Peters, 66 Cal. 114). As we understand the opinion in the first appeal, it was

there held that the action, being upon an agreement to pay upon an adjusted claim, is not upon the policy but upon the agreement, and may be maintained. The agreement is founded upon the policy, but it was in its essential elements a substitution of an entirely new contract, so far as it went, and upon a new consideration, to wit, to accept less than the amount of insurance and less than claimed by plaintiff. We cannot see that the fact that the new agreement (which need not be in writing) rested in parol affects the question. All the parties acted upon the new agreement as valid and binding up to the day the money was payable. It was executed on the part of plaintiff and defendant in the matter of having the awards and proofs made in writing, and filed with defendant, and it is practically conceded by defendant that but for the discovery of the alleged fraud and concealments of plaintiff the awards would have been promptly paid. We do not think the point now raised, that the new agreement is void because not reduced to writing, is available to defendant."

Stockton, etc., Works v. Insurance Company, 121 Cal. 167, 175.

Much the same reasoning was adopted, and the same construction given in the case of *Pearsall v. Henry* (153 Cal. 314). Plaintiffs in error have quoted from this case as in support of their contentions and have freely underscored particular language of the opinion, which standing alone might appear to be in line with their argument, *but which is not a part of the decision of the case.*

A careful examination of the decision itself will disclose that there is nothing in it which holds that

an oral agreement made subsequent to the accruing of a contractual liability, and which has for its purpose merely an adjustment or determination of the amount of the liability, constitutes an unexecuted oral agreement in modification of the original written contract.

Mr. Benton, it will be remembered, had fully performed the conditions of the contract on his part to be kept and performed. So far as he was concerned the contract was fully executed. The settlement arranged was as to a controversy which arose as to whether or not the lumber had been properly culled or graded. The total amount of the lumber delivered was ascertained at the time of delivery at the yards (Tr., p. 4). The adjustment made was made by the authorized agents and employees of the parties to the contract, who reduced it to writing and was signed by them. No question of the authority of the parties is made, and they were as admittedly the agents of the parties to the contract as was Warren in making the original contract with Mr. Benton.

We do not undertake to commend the findings in this case as model findings of fact upon which to base a judgment. In view of the fact that they were prepared by counsel for plaintiffs in error, we do not feel disposed to indulge in any extended criticism of them. We have already suggested that they are open to the criticism of being findings of probative and not ultimate facts. And yet, we contend, they are sufficient findings, and sufficiently full to sustain the

conclusions of law justifying the judgment in favor of the defendant in error, the plaintiff in the lower Court.

Upon the authority of the decisions of the Supreme Court of the State of California in the cases we have cited, the judgment of the United States Circuit Court in this case must, we respectfully submit, be affirmed.

PERRY & DAILEY,
Attorneys for Defendant in Error.

No. 1710.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as copartners, doing business under the firm name and style of W. E. KELLEY & COMPANY,
Plaintiffs in Error,

vs.

T. H. BENTON,
Defendant in Error.

ORAL ARGUMENT OF J. F. BOWIE, ESQ., FOR PLAINTIFFS IN ERROR.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

THE MURDOCK PRESS, 68 FREMONT ST., SAN FRANCISCO.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PRESENT: Honorable Circuit Judge GILBERT, *Presiding,*
Honorable Circuit Judge ROSS,
Honorable Circuit Judge MORROW.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as copartners, doing business under the firm name and style of W. E. KELLEY & COMPANY,
Plaintiffs in Error,

VS.

T. H. BENTON,
Defendant in Error.

No. 1710.

SAN FRANCISCO, Thursday, March 3, 1910.

ORAL ARGUMENT OF J. F. BOWIE, ESQ., FOR PLAINTIFFS IN ERROR.

May it please the Court:

The questions presented by this writ of error are, I believe, comparatively simple, but as they involve quantities of lumber and cash, I take the liberty of handing to Your Honors these tabulated statements, which you

may find it convenient to use for reference during the course of the argument.*

This action arises out of a contract which is set forth in the exhibit attached to the complaint. The contract is in the form of a letter written to W. E. Kelley & Company, defendants, and plaintiffs in error, by T. H. Benton, plaintiff, and defendant in error. The letter is as follows:

"PLATTEAU, SHASTA CO., CAL., 5/27/05.

"W. E. Kelley & Co.,
901 Chamber Commerce, Chicago, Ill.

GENTLEMEN:

For and in consideration of One Dollar ($1.00) to me in hand paid, receipt of which I herewith acknowledge; I hereby offer to sell you all the No. two Shop and better California Sugar and White pine that I manufacture at my Saw Mill near Platteau, during the season of 1905.

All grades mentioned in this contract are the same as per rules adopted Apr. 1st, 1903, by the Cal. Sug. & W. P. Agency—

All lumber to be delivered at Cottonwood, Cal. and piled in some convenient place near the Southern Pacific R. R. for shipment as directed by you.

The price of above lumber to be Twenty-four Dollars ($24.00) per M for all grades.

The terms of payment to be 60 ds from shipment or 2% off for cash (at my option) from face of invoice; cash payments to be made by your San Francisco office drawing sight draft on your Chicago office and remitting same promptly to Bank of Tehama County, Red Bluff, Cal. for credit on my account.

The sugar & white Pine to be delivered separately, also the several thicknesses of each to be delivered separate.

In the matter of delivery, my teams will, upon arriving with a load at point of delivery present your representative with our shipping tally in duplicate and if said load arrives in apparent good order you are to O. K. one copy & return

*The tabulated statement is appended to this argument, and will be found at page 25 thereof.

to us. If for any reasons loads appear damaged or short you to make notation of same on tally that is returned to us, this is for our convenience in keeping a check on our teamsters.

After lumber is delivered at R. R. by us you are to ship the same within thirty days, as soon as lumber is shipped by you; you are to furnish us promptly with a copy of tally showing the number of feet shipped by your men.

I am to always have the privilege of keeping an inspector on the ground to keep a check on your inspector if I desire.

In the event of your not shipping any portion of the above lumber within 30 ds from the time it is rec'd, you are at my request to make an estimate of said lumber and make settlement for same as per above terms.

It is understood that the above settlement based on estimates is not to be final, but is subject to adjustment after the final inspection at time of shipment is made by you. * * * "

The letter was signed:

"T. H. BENTON.

"Accepted:

W. E. KELLEY & CO.

By FRANK W. WARREN."

I would call Your Honors' particular attention to those clauses in this contract which provide that Kelley is to ship out the lumber within thirty days after the same is received, but if it be not shipped out, the amount is to be estimated and payments are to be made on the estimates, but that such payments made on estimates are subject to adjustment on the final tally and inspection which was to be made at time of shipment. It is with these clauses of the contract that this controversy deals.

According to my understanding of this contract, Benton was to make a rough tally of the lumber at his mill. He was then to ship the same by wagon to the

railroad where the defendant was to receive it and to O. K. the tally if the lumber arrived in apparently good order. This O. K., however, was, as stated in the contract, for the convenience of Benton in keeping a check on his teamsters. The lumber was then piled by the railroad track, and Kelley was to ship out all the No. 2 shop or better within thirty days if he could. If Kelley could not ship within this time, Benton was entitled to a payment on an estimate, but this payment on the estimate was subject to adjustment when the actual amount of No. 2 shop delivered was ascertained by the actual tally and inspection which was to be made at the time of shipment. This construction, which seems to be clear, is in harmony with the actual practice of lumber merchants. Of course in dealing with lumber the great expense to be avoided is that of re-handling, and to inspect and tally lumber it is necessary that each piece of lumber inspected be handled by both the grader and measurer. This inspection and tally is always made at a time when the lumber is being moved for the purposes of transportation, and I do not believe that a contract will be found between lumber merchants, which provides for the actual tally and inspection of lumber at a time other than that at which it is being handled for purposes of transportation or some other collateral purpose. When lumber is stacked or piled, it is dealt with on the basis of estimates—that is, a guess—made from the apparent condition of the surface of the pile.

Turning, however, to the facts of the case, and leaving the contract for a moment.

Benton, pursuant to the contract, shipped to Cottonwood lumber which totalled 2,779,276 feet. Of this lumber much fell below the grade of No. 2 shop, and no lumber which was below this grade was to be accepted by Kelley under the contract. In this regard the findings of the Court, which are unchallenged, show:

> "That in pursuance to the terms of said contract plaintiff delivered at Anderson, California, and at Cottonwood, California, 2,779,276 feet of lumber in gross; that said lumber was delivered at various times between June 5th, 1905, and November 22, 1905, the first delivery by plaintiff being made June 6th and the last November 22d; that said lumber was delivered by plaintiff at places designated by defendants, in accordance with the terms of the contract; that of said total amount delivered by plaintiff, there was a large amount of lumber of a grade below that of No. 2 shop and better, California sugar and white pine; that said lumber was not sorted so that the lumber of a quality of No. 2 shop or better was separate from that of inferior quality at the time said lumber was delivered by plaintiff and unloaded at the places designated by defendants."

Kelley & Company, however, were unable to ship out all the No. 2 shop contained in this large amount of lumber within the thirty days named in the contract. Their inability in this respect was due to the failure of the railroad company to supply them with a sufficient number of cars, and as a result of their failure to ship within the period of thirty days, under the very terms of the contract they became bound to make payment to Benton on estimates made pursuant to the provisions of the contract calling for them. But I must again repeat that such payment on estimates was pursuant to the terms of the contract, subject to adjustment by the

actual tally and inspection made at the time of shipment.

On about the 20th day of December, 1905, Benton called on Kelley to make payment for this lumber, and it would appear that at the same time Benton objected to some of the grading that had already been done by the Kelley people, and requested that some of the reject be re-graded. Kelley & Company and Benton at that time entered into an oral agreement by which it was agreed that the amount of No. 2 shop or better, contained in the mass of lumber delivered at the railroad, should be estimated. This, of course, was no more than the performance of the written contract of May 27th. An estimate was made and the amount of No. 2 shop or better estimated to have been delivered was 2,225,905 feet. Benton testified—over the objection and exception of the counsel for Kelley—and the lower Court found as a fact that, at the time this oral agreement was made between Benton and Kelley, Kelley agreed that he would accept the estimate in place of an actual tally and inspection, and that he would pay to Benton the purchase price for the amount of estimated lumber, viz.: $24.00 per thousand, for such amount as the estimators might conclude had actually been delivered, and that the payments so made should not be subject to adjustment on final tally and inspection. The estimate was made, but Kelley denied at all times that the estimate was final and conclusive, asserted at the time that the estimate was grossly in excess of the actual amount delivered, and refused to pay more than $20,000.00 in addition to prior payments.

The so-called contract providing for final payment on estimate was purely oral. The same is set out at length in findings Nos. 5 and 6, and the Court has found that Kelley never fully performed this agreement of December 20, 1905.

Subsequently after this estimate was made, Kelley obtained cars and graded, inspected and tallied all the lumber that was delivered at the railroad, shipped out all the No. 2 shop or better, and the Court has found that the actual amount of No. 2 shop and better which was delivered by Benton was 1,774,648 feet and no more. So it appears from the findings that the estimators over-estimated the amount actually delivered some 451,257 feet. But the lower Court, finding as it does that the written agreement of the parties was changed and modified by the subsequent oral agreement which has not been fully performed, has ordered that Kelley pay to Benton the sum of $7,656.63, which, added to what has already been paid, would make the full purchase price of 2,225,905 feet of lumber, the amount *estimated* to have been delivered. In other words, the lower Court has directed that the defendants pay at the rate of $24.00 per thousand for 451,257 feet of lumber which they never received and which has never been delivered to them, this judgment being delivered in order that there may be a completed execution of the unexecuted oral modification of the prior written contract. If this judgment is correct, the error of the estimators has cost the defendant $10,830.16, as he has already overpaid the plaintiff for the lumber actually delivered $3,173.54.

It should be noted at the outset that the complaint in the action on which this money has been recovered, does not in any way hint at the existence of the subsequent oral agreement, nor is there any claim made in the complaint to any right to recover for lumber not actually delivered. In the complaint the plaintiff alleges that in accordance with said contract, that is, the written contract, which is made an exhibit:

> " * * * the said plaintiff did deliver to the said defendants, in the county of Shasta, State of California, California sugar and white pine lumber of the grades of No. 2 shop and better, to the extent of two million two hundred and ninety-seven thousand, one hundred and seventy-five feet (2,297,175 ft.), and the said defendants did receive of and from the plaintiff, under the terms of said contract, two million two hundred and ninety-seven thousand one hundred and seventy-five feet (2,297,175 ft.) of California sugar and white pine lumber of the grades of No. 2 shop and better.
>
> "That by reason of the sale and delivery of said lumber to said defendants, the said defendants became indebted to the plaintiff in the sum of Fifty-five Thousand One Hundred and Thirty-two and 20-100 Dollars ($55,132.20) in gold coin of the United States.
>
> "That the said defendants have not paid the said plaintiff the said sum of Fifty-five Thousand One Hundred and Thirty-two and 20-100 Dollars ($55,132.20), or any part thereof, save and except the sum of Forty-five Thousand One Hundred and Sixty-four Dollars ($45,164.00); and there is still due, owing and unpaid from the said defendants to the said plaintiff the sum of Nine Thousand Nine Hundred and Sixty-eight and 20-100 Dollars ($9,968.20)."

It will thus be seen that the *plaintiff sues for 2,297,175 feet of lumber sold and delivered, not for 2,225,905 feet estimated.* The complaint is silent, absolutely silent, as to any estimate, and as to any oral agreement, and counts merely on an actual sale and deliv-

ery pursuant to the written contract. The answer denies the sale and delivery alleged in the complaint, and states that there was but 1,750,268 feet actually sold and delivered. The answer does not set up the true amount sold and delivered because it was not until some short time after the answer was filed that the grading and inspection were finally completed, all the No. 2 shop shipped out, and the true amount ascertained. This delay was due to the railroad congestion which took place on this coast consequent upon the San Francisco fire of April, 1906.

The findings upon the issues raised by the pleadings are that plaintiff did not sell and deliver 2,297,175 feet, but only actually sold and delivered 1,774,648 feet, and the findings show what happened to part of the surplus of the lumber which was below grade. In regard to this they say:

> "* * * that a large amount of the lumber delivered by plaintiff to defendants was rejected by defendant, as not being No. 2 shop or better, and was piled separately from the lumber not yet graded; that, of the lumber so rejected, plaintiff sold, to-wit, 19,000 feet to one Cunningham prior to November 9th, 1905, and also sold a large number of feet to one F. W. Warren.* * *"

There could not have been and there is no statement made in the findings that the defendant had accepted or received or used any of the rejected lumber. Under these circumstances, it is perfectly apparent that the complaint does not support the judgment.

It is an elementary rule that a plaintiff must recover under a cause of action which he has pleaded, or not at all. He cannot prove a totally different cause of action

from that on which he sued. The cases cited in our opening brief sufficiently develop this question, and there is no technical legal rule better settled. This in itself necessitates a reversal of the judgment.

It is true that our opponents contend that this is a mere variance which will be disregarded. Such, however, is not the fact, and to illustrate the difference between the defects of this class and a mere variance I beg to refer Your Honors to the case of *Schirmer* v. *Drexler,* 134 Cal. 134. In this case the Supreme Court of this State said:

> "* * * The findings and decree seem to be entirely outside of the case made by the pleadings. The said findings and decree contradict the material allegations of plaintiff's complaint, and there seem to be no allegations at all in the complaint to which the findings and decree can be held to be material or pertinent. The whole theory of the complaint is, that the plaintiff's rights are those of an owner, acquired by adverse use of the ditch and the water. The findings and decree proceed upon an entirely different theory, and expressly state that the use of the water and of the ditch by plaintiff and his predecessor in interest therein was had with the consent of the owners thereof and under an oral license or agreement therefor. The decree attempts to enforce the specific performance of a contract which is not only not set up in the complaint, but to which no reference is made anywhere in the pleadings. We know that there are cases which hold, as contended by respondent, that where a question is treated by both parties as an issue in the case, and evidence is taken thereon without objection, the appellant will not thereafter be heard to say that the question was not in issue. That is a salutary general rule, and we do not wish to overturn it. But in none of those cases, that we have been able to find, were the findings and decree clear outside of the case as made by the pleadings, but in each and all of them the findings, taken all together, have some relation to the issues as framed; but here the

issues as made by the pleadings sustain no degree of kinship whatever to the findings and decree, and are, besides, in direct conflict with the allegations of the complaint. It would be going too far to hold that such a variance as this should be deemed to be waived by failure to object to evidence at the trial. If the burden was on the plaintiff to establish the case made by his complaint, why should the defendants object to evidence, as long as it went to show that the case as thus made did not exist? If this kind of a judgment can be upheld on this kind of a record, then written pleadings are no longer necessary, and may well be dispensed with altogether.

"As supporting the position we here take, we cite as follows: *Dobbs* v. *Purington*, XXII Cal. Dec. 245; *Wallace* v. *Farmers' Ditch Co.*, 130 Cal. 578; *Reed* v. *Norton*, 99 Cal. 617; *Murdock* v. *Clarke*, 59 Cal. 683; *Green* v. *Chandler*, 54 Cal. 626; *Morenhout* v. *Barron*, 42 Cal. 605. In *Riverside Water Co.* v. *Gage*, 108 Cal. 240, speaking of a waiver by failure to object to evidence on the trial, in this connection the court says: 'This rule, however, has no application in a case where, at the trial, evidence is introduced which is outside of any issue which is presented by the pleadings.' 'A plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs.' (*Reed* v. *Norton, supra.*)"

I deem it unnecessary to answer further the argument of defendant in error on this point, or to distinguish separately each case cited. I can answer all those cases at once by stating that although under the code practice a variance is not perhaps of so much importance as at common law, this is not a case of variance between the proof and the pleading, or the proof and the judgment; but it is a plain case of a judgment on a cause of action not pleaded. It is not contended that the proof offered supports the complaint in spite of the immaterial variance; but the defendant in error must

contend that the defect in this case is immaterial, although on the cause of action pleaded the findings are in favor of the defendant, because on a different cause of action, the evidence of which was introduced over objection, findings have been made which are in favor of the plaintiff. No case can be found where it has been held that where evidence admitted to be at variance from the complaint was introduced over the objection of defendant, and no amendment was made to conform the pleadings to the proof, and findings were made covering all the issues presented by the pleadings, and also covering the new matter not pleaded, and the findings on the issues raised by the pleadings were in favor of the defendant, still a judgment for the plaintiff will be supported by the findings on the matters not pleaded, and the evidence to support which was introduced over objections. Such is the case at bar. Let the Court take this record and read, beginning with the complaint, through the bill of particulars, the answer and the findings of fact numbered 1, 2 and 3, or from the beginning of the transcript to and including page 47. It will conclusively appear that the action was to recover the balance of the agreed price for 2,297,175 feet of lumber sold and delivered at $24.00 per thousand; that the plaintiff specified his demand by a bill of particular items, showing a great many deliveries of lumber, totaling 2,779,276 feet, from which was deducted 482,101 feet, stated not to be contract lumber, leaving the number of feet as set forth in the complaint of contract lumber; that the answer denied the delivery of more than 1,750,268 feet, and set up

payment in excess of the total amount due; that findings 1, 2 and 3 dispose of the issues absolutely, and entitle defendant to a judgment. The defendant is undoubtedly entitled to reversal of the judgment because it was pronounced in favor of the plaintiff in spite of the issues being determined in favor of the defendant.

It is unnecessary to answer the contention of defendant in error that finding three is of probative facts, while findings 4, 5 and 6 are of the ultimate facts; for the exact reverse sufficiently appears from a reading of those findings. Findings 4, 5 and 6 might be dropped from the case, so far as the cause of action set forth in the complaint is concerned. This error of law necessitates a reversal. But if a conflict actually existed between findings 1, 2 and 3 and the subsequent findings, these latter findings would be disregarded according to settled rules of law, for findings 1, 2 and 3 are responsive to and dispose of the issues raised by the pleadings and the latter findings are without the issues and must be disregarded.

Morenhout v. *Barron*, 42 Cal. 591;
Marks v. *Sayward*, 50 Cal. 57.

Coming however to the merits, and looking at the case irrespective of mere technical rules of procedure, it is, I submit, apparent not only that the judgment in this case should be reversed, but that it should be reversed with instructions to the lower Court to enter judgment in favor of the defendant for $3,173.54, the amount of cash which they have actually over-paid to the plaintiff. It is perfectly clear that if the rights of

the parties are measured by the contract in writing which the parties executed, the plaintiff should repay to the defendant this sum of money, nor do I understand that my opponents contend otherwise. According to the contract this over-payment has been made on the estimate, and according to the contract this over-payment should be refunded. But, on account of the subsequent oral agreement of December 20th, it is contended that not only should the plaintiff keep this sum—which is the amount paid him in excess of the amount due for lumber actually delivered—but that he should receive in addition $7,656.63.

It may be conceded that if the oral agreement, which the lower Court has found that the parties made, is legally enforceable, the conclusion of the Court and the contention of our opponents would be correct *had that agreement been pleaded.* But it is definitely settled in this State that an oral agreement modifying a prior written contract is absolutely invalid unless it be fully executed. Section 1698 of the Civil Code provides that:

> "A contract in writing may be altered by a contract in writing, or by an *executed* oral agreement, and not otherwise."

And Section 1661 of the Civil Code defines an executed contract as follows:

> "An executed contract is one, the object of which is fully performed. All others are executory."

In *Pearsall* v. *Henry*, 153 Cal. 314, the Supreme Court of this State said:

"'A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' According to section 1661 of the Civil Code, an executed agreement is one 'the object of which is fully performed. All others are executory.' If the agreement of April 23, 1901, is to be regarded as a mere modification or alteration of the then existing agreements, it must be conceded that it was not executed within the meaning of section 1698, and is therefore not now enforceable. An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligations of both parties in order to bring the modification within the terms of the statute. (*Henehan* v. *Hart,* 127 Cal. 657, (60 Pac. 426); *Thompson* v. *Gorner,* 104 Cal. 168, (43 Am. St. Rep. 105, 37 Pac. 900); *Platt* v. *Butcher,* 112 Cal. 634, (44 Pac. 1060); *Mackenzie* v. *Hodgkin,* 126 Cal. 591, (77 Am. St. Rep. 209, 59 Pac. 36); *Harloe* v. *Lambie,* 132 Cal. 133, (64 Pac. 88).)"

The fact that the contract in question has never been executed is sufficiently demonstrated by this judgment being rendered avowedly for the purpose of enforcing and carrying out the executory portion thereof, in accordance with the finding of the Court "that the defendants have never fully performed said agreement of December 20th, 1905."

But under our Code provisions the rights of the parties must be measured by the contract annexed to the complaint on which the action was brought—the written contract which the parties made, and as to the existence of which there is no dispute.

But even if we had no such section as Section 1698 of the Civil Code, the same result would inevitably ensue, as the contract in question is a contract within the Statute of Frauds. This is obvious; and it is definitely

settled by the general law that contracts within the Statute of Frauds cannot be modified except by another written contract, or by a parol agreement, which parol agreement has itself been sufficiently executed to take it out of the operation of the statute.

This rule was expressed by the Supreme Court of the United States in *Swain* v. *Seamens,* 9 Wallace 254, 272, where it was said:

> "* * * The better opinion is, that a written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of *Marshall* v. *Lynn,* is that the terms of a contract for the sale of goods falling within the operation of the statute of frauds cannot be varied or altered by parol. * * *"

Here the parol modification was never executed in any way. There was not a single thing done in pursuance of the oral agreement which could be referred to it alone, and which was not equally referable to the written agreement of the parties. It is true an estimate was made, but this estimate was called for by the written contract.

I see it is contended by our opponents that, in reliance on this contract, Mr. Benton withdrew his inspector. I am informed that, as a matter of fact, Mr. Benton never had an inspector on the work until it came to estimating, when the estimating was made by two persons together, one representing him and one representing Kelley. Nor do the findings of the Court show that Benton had or kept an inspector on the work, as he had a right to do under the contract. The fact is,

Benton never exercised this right, but even if he had exercised it, it would not have been of any advantage to him, nor would he lose anything by withdrawing his inspector, if he did withdraw him; because Kelley & Company had to pay for every foot of lumber shipped out, and the amount of lumber shipped out was tallied, not only by them but by the railroad company, and the quantity was shown by the freight-bills, and every foot of lumber which they did not ship out remained by the railroad track and was taken and used by Benton. He could inspect the reject at any time, and he lost no rights by not inspecting the lumber shipped and tallied, because the shipping and tallying of the same was an acceptance, and there is no pretense, nor has it been claimed in any way, that every foot of lumber shipped was not properly accounted for. This question is settled by the findings. Indeed, any attempt by Kelley to take an unfair advantage of Benton on account of the absence of an inspector would be useless, because freight had to be paid on the lumber, and the freight-bills of the railroad company were introduced in evidence in this case.

So I say not a single act was done which, even under the general rule, would operate as a part performance of this oral agreement so as to take it out of the Statute of Frauds, and it is thoroughly settled, both in this State and in England, that no act of part performance is ever sufficient to take a contract out of the Statute of Frauds unless it is itself clear evidence of the agreement sought to be proved.

In *Maddison* v. *Alderson,* 8 Appeal Cases 467, 479, Lord Chancellor Selborne laid down the rule in this respect as follows:

> "'It is in general,' said Sir James Wigram, 'of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. * * * But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase-money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the Court does not in general give relief.' * * * "

And the rule is the same in this State.

In *Feeney* v. *Howard,* 79 Cal. 525, our Supreme Court said:

> "The position that there was part performance sufficient to take the case out of the statute cannot be sustained. Whatever was done by Howard the deed gave him a right to do."

I repeat, whatever was done by either party hereto the original contract in writing gave them a right to do.

Continuing, our Supreme Court said:

> "And to say that the deed itself, or what was done under it, is part performance, is merely to reassert in another form that the parol agreement was sufficient to raise the trust."

In this case the raising of the trust would have had the effect of altering a written instrument.

But there is another and different reason which completely disposes of all questions of part performance, and of all questions relative to the parol contract in this case. The Statute of Frauds applies to such a contract. That is clearly and definitely settled, and if it were possible that plaintiff had a right to recover in equity on the ground of part performance, such right could not be asserted on the law side of this Court. This is an action at law, pure and simple, and is brought on the law side of the Court, and, even if there was sufficient part performance of this parol agreement to obtain relief in equity, he could obtain no relief at law on that ground in this action at law. Browne on the Statute of Frauds, section 451, says:

> "It is settled by a long series of authorities, that a part execution of a verbal contract within the Statute of Frauds has no effect *at law* to take the case out of its provisions. * * *"

Many cases are cited to this effect, but I will refer only to the following:

In the case of *Warner* v. *Texas & P. Ry. Co.*, 54 Fed. 922, 925, the Circuit Court of Appeals for the Fifth Circuit said:

> "But the plaintiff in error contends that the performance by him within one year of his part of the agreement took the contract out of the statute of frauds. *The answer to this contention is that part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions, but is only a ground for equitable relief, and cannot be urged as a defense in a suit at law.* Browne, St. Frauds, § 451; 2 Story, Eq. Jur. §§ 759, 1522, note 3; *Railroad Co.* v. *McAlpine*, 129 U. S. 305, 9 Sup. Ct. Rep. 286. We perceive no error in the ruling of the court below, and the judgment must be affirmed."

This case, I should state, has been overruled in another respect, but the point to which I cited it has, so far as I am aware, never been questioned.

There was at one time a dictum of Mr. Justice Buller's to be found in English cases to the effect that part performance of a contract within the Statute of Frauds could be availed of in an action at law, and merely for the purpose of showing that this dictum was never recognized as authority, but was abandoned, I cite, in addition to the authorities already cited, the case of *O'Herlihy* v. *Hedges,* 1 Schoales & Lefroy's Rep. 123, 130, in which case Lord Redesdale said:

> "But this is a contract on which no action at law could be maintained, notwithstanding what Mr. Justice Buller says in one or two cases, that part performance takes a case out of the statute, at Law as well as in Equity. That opinion will be found wrong; and I recollect Mr. Justice Buller, upon being pressed with the consequences of that opinion in case of a demurrer to evidence, being obliged to abandon the position. The ground on which a Court of Equity goes in cases of part performance, is that sort of fraud which is cognizable in Equity only."

The suggestion of defendant in error that the report of the estimators was itself a written agreement of the parties is unsound, for the reasons:

(1) The report was not signed by the parties, but by the inspectors, who had no authority to bind their principals, for Section 2309 of our Civil Code provides:

> "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

(2) The report does not contain any agreement at all to pay for the amount shown thereon, and is not the agreement on which the recovery in this case is based. The findings themselves place the recovery on the oral agreement of December 20th, an agreement to pay not for the amount delivered, but for the amount estimated to have been delivered, not on the written contract to pay for lumber actually sold and delivered on which the complaint is based.

The theory that the estimate was in the nature of a determination of the amount actually sold and delivered, binding and conclusive upon the parties, though erroneous, is utterly untenable for two reasons:

(a) The findings show that the oral agreement contained a promise to pay which has not been performed.

(b) Even if such were the oral agreement shown by the findings, the contract would still be invalid, not having been fully performed. Under the original contract defendant was to pay for the amount actually sold and delivered. The agreement provided for a method of determination calculated to ascertain correctly the amount delivered, and it is absurd to say that the promise to pay remains the same; that is a promise to pay for the amount actually sold and delivered, when by a subsequent agreement the amount is to be determined by guess work. This alters the very nature of the promise and makes it a promise to pay for the amount estimated.

In concluding, I respectfully submit that it is perfectly clear that the judgment here under discussion must be reversed.

The contention that there is a conflict between finding three and the other findings is based on what seems to me to be an unintentional misrepresentation of the facts. *There is no conflict;* on the contrary the findings taken all together are logical, and correctly state the facts. The Court finds that a written contract was made; finds what was done in pursuance of said contract; finds that some seven months afterwards an oral modification of the written contract was made; finds that the subsequent oral modification was not fully performed, and directs its performance.

REPLY TO MR. DAILEY.

I have very little to say in reply to the argument made by Mr. Dailey. It is not a fair statement of the facts, and the inferences which he attempts to draw are utterly unwarranted, particularly insofar as the findings are concerned.

I did not come into this case until after it was decided in the lower Court, but I do know the facts relative to the preparation of the findings. As Mr. Dailey states the case, the findings were prepared by the losing side, but this was done in accordance with the rule of this Circuit which required the losing side to prepare the findings, and these findings, after being prepared, were submitted to Mr. Dozier, the attorney for the plaintiff, in accordance with the rule. Not only were these findings submitted to him, but he was written to

repeatedly, both by the Court and counsel for the plaintiff in error, requesting him to suggest any amendments, if he had any to suggest. As Mr. Dozier made no response to these communications, and proposed no amendments, the Court then went over the findings itself, made certain corrections in the findings proposed, and signed the findings, and those findings express fairly and truly, as I understand it, the views entertained by the Court and expressed in its decision.

Relative to what has been said by Mr. Dailey concerning the removal of the inspector, I may say that, as I understand the facts of this case, no inspector was ever kept on the work by Benton. He never had anybody there except during the estimating, and it is with reference to that time alone that we must read the testimony of Mr. Warren—the cross-examination—which is the only place in which any mention is made of the withdrawal of an inspector.

But, as I have already stated, the question of part performance is out of the case. This is an action at law, and part performance is a matter for equity alone and cannot be availed of nor affect the decision on the law side of this Court. Nor do I see what standing the plaintiff would have in a court of equity upon the bare facts of the case. It can hardly be said that equity will aid the plaintiff in securing $10,830.16, as the purchase price of 451,257 feet of lumber which he never sold, which he never delivered, which was never received, but which he claims a right to recover merely on account of an error made by the estimators appointed by the parties. I do not believe that the recovery of

such a sum, under such circumstances, is a matter in which equity will assist the plaintiff, even if he could otherwise make out the necessary case.

I hope I have made the facts of the case clear in the course of the argument, for after all the propositions of law involved are simple and elementary, and the matter is one almost wholly of fact.

QUANTITIES OF LUMBER

Amount of No. 2 shop *alleged* by Benton to have been delivered ..... 2,297,175 feet
Tr. p. 2, Par. III.

Amount of No. 2 shop *found by Court* to have been delivered ..... 1,774,648 feet
Tr. pp. 46 and 47.

Amount of No. 2 shop *estimated* to have been delivered ..... 2,225,905 feet
Tr. p. 49.

Excess of amount as *estimated* over amount *actually delivered* ..... 451,257 feet

AMOUNTS OF MONEY

Money *paid by Kelley:*

On *actual tally and inspection*	$25,164.00
On *estimate*	20,000.00
Credits on discount	601.09
Total	$45,765.09

Tr. p. 47.

Money *claimed by Benton* in his complaint $55,132.20
Tr. p. 3.

Money found due under estimate by judgment 53,421.72

NOTE.—The amount is arrived at by multiplying the quantity of lumber *estimated* to have been delivered by the flat contract price of $24 per M.

Tr. p. 49.

Amount of money recovered by judgment 7,656.63

NOTE.—This sum is the difference between the contract price of the *estimated* amount and the sums paid.

Tr. p. 50.

Amount of money due under contract sued on 42,387.92

NOTE.—This sum is the product of the amount of lumber actually delivered multiplied by the contract price of $24 per M.

Excess of *amount received and recovered* by Benton over *amount due under contract sued on* 10,830.16

Actual cash *overpayment* received by Benton 3,173.54

No. 1710

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as copartners, doing business under the firm name and style of W. E. KELLEY & COMPANY,

Plaintiffs in Error,

vs.

T. H. BENTON,

Defendant in Error.

ORAL ARGUMENT OF JOHN J. DAILEY, ESQ., FOR DEFENDANT IN ERROR.

Filed this.....day of April, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

FILED

No. 1710

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Present:

Honorable Circuit Judge GILBERT, Presiding,
Honorable Circuit Judge ROSS,
Honorable Circuit Judge MORROW.

WILLIAM E. KELLEY and ALLAN H. DAUGHARTY, as copartners, doing business under the firm name and style of W. E. KELLEY & COMPANY,
Plaintiffs in Error,

vs.

T. H. BENTON,
Defendant in Error.

ORAL ARGUMENT OF JOHN J. DAILEY, ESQ., FOR DEFENDANT IN ERROR.

SAN FRANCISCO, Thursday, March 3, 1910.

May it please the Court: We are in a peculiar and rather awkward position before the Court at this time, and we feel because that of our own em-

barrassing position, and in justice to the Court below, an explanation is due and proper from us as going to show the reason for the somewhat inconsistent presentation of this case to this Court.

This action was commenced in June, 1906, trial had June 26th and 27th, 1907; on June 27, 1907, Judgment was ordered in favor of plaintiff, and defendant in error before the Court now. The Findings were signed and filed, and the Judgment entered September 28, 1908, one year and three months after Judgment was ordered for plaintiff. We were substituted as attorneys for plaintiff after the filing of the Findings and Judgment, and just before the settlement of the Bill of Exceptions in the case, and as soon as defendant in error learned the true condition of facts relative to the entry of Judgment and this appeal. For some reason beyond my power of explanation the former attorneys for plaintiff never prepared or submitted Findings to the Court below, nor did they agree to the Findings as prepared, or take any action whatever towards settling the Findings, and the attorneys for defendants, in order to have something to appeal from, prepared and submitted to the Court the Findings in the case, and Judgment was thereupon entered upon these Findings. We must say that the Findings in this case reflect the work of a master mind and hand in their preparation, and are as easy on plaintiff in error as it is very well possible for them to be and still support a Judgment in favor of plaintiff in this action.

The attack of plaintiffs in error centers on two propositions. First, that there was an oral modification of the original written agreement of May 27, 1905. Second, an attack on the Findings of the Court below.

The so-called oral modification is attacked and objected to,—(a) on the ground that it is not pleaded in the complaint; (b) on the ground that a written agreement cannot be modified other than by a written agreement, or an executed oral agreement; (c) that the so-called modification comes within the Statute of Frauds and therefore must be in writing.

In answering the first proposition we contend there was no modification of the written agreement of May 26, 1905. The written contract provided that plaintiffs in error were to purchase and take all of the #2 shop and better California Sugar and White Pine lumber manufactured at the mill of defendant in error;

That defendant in error was to deliver this lumber at the railroad;

That the grade was to be determined as per the rules adopted by the "California Sugar And White Pine Agency";

The price was $24.00 per M;

The terms of payment 60 days from shipment, or 2% off for cash (at the option of Mr. Benton);

Mr. Benton was to have the privilege of keeping an inspector on the ground to keep a check on the inspector of plaintiffs in error.

If the lumber was not shipped within 30 days after delivery at railroad, *plaintiffs in error* were to make an estimate of the lumber delivered and settle on that estimate, but this estimate *made by them* was not to be final.

From these provisions it will be seen that it was the intention and agreement of the parties that plaintiffs in error were to take all of the 2 shop and better; that the lumber was to be shipped within 30 days after delivery; that payment was to be made within 60 days after shipment, or all paid for at once at the option of Mr. Benton.

Mr. Benton would have been paid for all his lumber within 90 days after delivery, if plaintiffs in error had lived up to their agreement, and shipped the lumber within the time agreed, and if the controversy had not arisen over the grading of the lumber. It is very essential to a saw-mill owner and operator that he receive the cash for his product within a reasonable time after it is sold, for his pay roll and other expenses are large and must be met promptly. Plaintiff thought he had secured this when plaintiffs in error agreed to pay for the lumber within 90 days after delivery, or, if he should deem it necessary, within 30 days, by accepting a discount of 2%.

Now what happened? The lumber was not shipped within 30 days, and for a long time thereafter. Mr. Benton was not getting his money. A controversy arose over the application of the rules of the "California Sugar And White Pine Agency". Mr. Benton claimed that lumber within the grade called for was being graded into a class arbitrarily classed at "3 shop"—a classification of their own —(see p. 72 tr., tes. of Mr. Benton), and that a large quantity was put with lumber designated as common.

Nowhere in the contract is there any provision for determining and settling any dispute that might arise over the manner of grading the lumber. A dispute did arise. Mr. Benton was objecting to the classification as made by plaintiffs in error. Mr. Daugharty, one of the plaintiffs in error, admitted Mr. Benton had some ground for complaint in this regard when he testified (see p. 105, tr.):

> "but that in some lumber, which had been segregated as box or common or #3 cuts, there was considerable contract lumber. He also called my attention to the fact that lumber that was contract lumber and was used for pile bottoms —took me over and showed them to me,—lumber had been piled on lumber which was laid on the ground, and then the principal pile erected on it. There was no doubt at all. I am a competent grader, and there was no doubt that what Mr. Benton was correct."

According to their own admissions Mr. Benton had cause for complaint.

Plaintiffs in error were behind in their payment; behind in their shipments; and were not correctly grading the lumber. Under this condition of things it is easy to see it would have been futile for Mr. Benton to have called for an estimate from *plaintiffs in error* for the purpose of making a settlement.

Mr. Benton was in no manner at fault for the condition of things. There was no reason why he should not receive payment for his lumber. At the meeting in Anderson in 1905, after a discussion of the situation and disputed grading, plaintiffs in error themselves suggested the plan of settlement (see tr. p. 95, tes. of John R. Lowdon), who testified that Mr. Daugharty said:

> "We will settle this matter now and went on to tell how he thought it could be done by he appointing a grader and Mr. Benton appointing a grader, and they two go on and grade and grade it out, and if there was any disputed lumber they should lay that out to one side, and if Mr. Daugharty and Mr. Benton could not adjust it, that the two graders would select another grader and they would settle it, and that would be the final adjustment of their lumber affairs."

Mr. Daugharty testified (p. 106, tr.):

> "There was some talk about the possibility of disagreement between our grader and his grader, and I suggested myself that that portion that they could not agree upon should be laid out, and if it amounted to any very great amount, let some disinterested grader decide that. If they had gone far enough to find 50,000 feet that we could not agree upon, that would amount to $1200, and that we did not

want to advance unless the lumber was there, and if it was there Mr. Benton had a right to a payment on it."

In pursuance of this agreement Mr. Benton appointed Mr. Ruff; plaintiffs in error appointed Mr. Clifton; they graded all of the lumber that had not been shipped out. (There was no question over the grade of the lumber that had been shipped by plaintiffs in error) and the result was as set forth in paragraphs 4 and 5 of the Findings of the Court. This report was accepted and agreed to as correct. (See Finding 5, p. 49, tr.)

This was a *final settlement* of the disputed grading, and therefore a final settlement and determination of the amount of lumber delivered within the grades called for, and as the time for payment was past due, was a *final settlement of the liability between them.* Plaintiffs in error paid Mr. Benton $10,000 on December 21, 1905, $10,000 January 16, 1906, and $5,800 March 2, 1906, leaving a balance due, as the Court found, of $7,656.63.

Wherein was there a modification of the original agreement? The amount of lumber delivered was finally and definitely determined upon the settlement of a controverted question, as to the grade. The contract provided for the payment at the rate of $24.00 per M.

Plaintiffs in error urge that this oral agreement being an unexecuted agreement, and within the Statute of Frauds, could not be pleaded or evidence,

offered under it. For the sake of argument let us for the moment admit that the so-called oral agreement was a modification of the original agreement. Let us see whether or not it could be set up. Section 1689, C. C. Cal., provides:

> "A contract in writing may be altered by a contract in writing, or by an executed oral agreement."

What is an executed contract? An executed contract is one, the object and purpose of which is fully performed. What was the object and purpose of this oral agreement? To determine through graders appointed, by each side respectively, the controversy over the grading that had been made, and to determine the quantity of 2 shop and better that had been delivered by Mr. Benton, and thereby fix the liability of defendants. The contract itself provided the measure determining the liability after the amount of lumber delivered had been determined. Plaintiffs in error incurred no new liability.

(1st) The graders were selected; (2nd) they made their report; (3rd) the report was accepted as correct; (4th) part payment of the money thereby found due was made. In what respect was the object and purpose of this oral agreement not fully performed?

That part of Finding 6 upon which Mr. Bowie has laid so much stress:

> "That defendants have never fully performed said agreement of December 20, 1905, and have

> paid plaintiff no moneys pursuant to the said agreement."

is mere surplusage; it is not supported by any evidence, for defendants admitted $20,000 had been paid thereafter; and is another example of the subtle skill of the mind and hand that prepared these Findings.

We contend that the Findings, subtle though they be, should be held to, and will support the Judgment. It is true Finding 3 is inconsistent with the other Findings and with the Conclusions of Law and Judgment.

If the Court was correct in its conclusion that the examination and grading made in accordance with the oral agreement of December, 1905, and agreed to as correct by the parties, fixing and determining the amount and the grades of the lumber delivered by Mr. Benton to plaintiffs in error, and their liability therefor, then Finding 3, which relates to the shipment of the lumber subsequent to the commencement of the action, and subsequent to the filing of the answer of the defendant, and subsequent to the time that Benton withdrew his inspector, and treated the matter as settled and determined, is an immaterial Finding.

> "Where the facts found by the Court are such that might authorize different inferences, it will be assumed that the one drawn by the trial Court was one that would uphold rather than defeat the Judgment."
>
> *Nevills v. Moore Min. Co.*, 135 Cal. 561.

"Where Findings are capable of different constructions construction should be given which will uphold the Judgment."

Brison v. Brison, 90 Cal. 323;

Krasky v. Wollpert, 134 Cal. 338;

Paine v. San Bernardino Val. Trn. Co., 143 Cal. 654.

Leaving Finding number 3 out of the Findings entirely the Court has fully and sufficiently found the facts necessary to support the Judgment, and all of the ultimate facts, therefore Finding number 3 can be eliminated entirely from the Findings and the Judgment remain supported in every part.

Disregarding the Finding number 3 the only question that remains is the question of whether or not the case presents any variance between the pleadings and proofs, and if it does present such variance, whether or not the variance is such as to justify a reversal of the Judgment.

Section 469 of Civil Code of Procedure provides:

"No variance between the allegations in the pleading and the proof is to be deemed material, unless it has actually mislead the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so mislead the Court may order the pleadings to be amended upon such terms as may be just."

Section 470 of the same Code provides:

"Where the variance is not material, as provided in the last Section, the Court may direct

> the fact to be found according to the evidence, or may order an immediate amendment without costs."

We do not believe there is any substantial variance between the pleadings and the proofs. The contract sued upon is the contract upon which the recovery was made, and the proofs which were introduced to establish the delivery of the lumber were no more a variance than would have been the introduction of an admission made by the defendants to the effect that they had received the amount of the lumber alleged to have been delivered under the contract.

> "Where the only difference between the agreement pleaded and the proof is a difference in the rule by which compensation is to be made, and if the proof corresponds with the rule for measuring compensation, which is pleaded by the appellant himself, the proof should not be held to amount to a fatal variance."
>
> *Griffith v. Ridpath*, 80 Pac. Rep. 820.

The determination as to what was done in accordance with the oral agreement of December, 1905, in relation to settling the question of the grade of the lumber, and as to whether or not it was a final determination of the controversy, and for a final settlement, was fully gone into on the trial of the case, so there can be no possibility that the defendants were mislead to their prejudice in maintaining their defense upon the merits of the case.

> "Where there is enough in the bill to warrant the relief, and the defendant could not have

been taken by surprise, the Decree should not be reversed on the ground that the allegata and the probata do not sufficiently agree to justify it."

Moore v. Crawford, 130 U. S. 122.

If it is claimed that the adverse party has been mislead by the variance it must be made to appear to the satisfaction of the Court that he has been so mislead.

13 Ency. of Evidence, 648, Citing:
Plate v. Vega, 31 Cal. 383;
Degan v. O'Reilly, 32 Cal. 11;
Stout v. Coffin, 28 Cal. 65;
Hitchcock v. McElrath, 72 Cal. 565;
Moore v. Douglas, 132 Cal. 399, and other cases.

"Where the evidence sustains the case made by the pleadings, so that another action could not be maintained on the same evidence offered in support of the pleadings therein, there is no material variance."

13 Ency. of Evidence, 650, Citing:
Reed v. State, 16 Ark. 499;
Frazer v. Smith, 60 Ill. 145;
U. S. v. Murphy, 27 Fed. Cases, #16047.

The reason that the allegations and proofs must correspond is intended to answer the double purpose of distinctly and specifically advising the opposite party of what he is called upon to answer, so as to enable him to properly make out his case and

to prevent his being taken by surprise in the testimony at the trial, and of preserving an unerring record of the cause of action as a protection against another proceeding based upon the same cause.

The brief of defendant in error on file in this case quite fully presents our views on the question of variance and the effect of a conflict between Findings of probative facts and the Findings of ultimate facts, and contains quite a full and complete citation of cases supporting the arguments and propositions of law therein contained, and we respectfully refer the Court to the said brief for a fuller argument on these questions and a fuller citation of authorities, feeling that it is a waste of time to argue these propositions orally when we have already presented the matter to the Court in the brief mentioned.

Mr. Bowie in his argument has laid considerable stress upon the following part of Finding number 3.

> " * * * that a large amount of the lumber delivered by plaintiff to defendants was rejected by defendant as not being #2 shop or better, and was piled separately from the lumber not yet graded; that, of the lumber so rejected plaintiff sold, to-wit, 19,000 feet to one Cunningham prior to November 9, 1905, and also sold a large number of feet to one F. W. Warren * * *."

What has this part of Finding 3 to do with the issues in this case? Its only purpose seems to me to be as further evidence of the skill displayed in the preparation of these Findings.

Some enlightenment may also be thrown upon the purpose of having such a Finding by the further argument of Mr. Bowie to this Court (as shown on p. 17 of his printed oral argument) when he used the following language:

> "And every foot which they did not ship out remained by the railroad track and was taken and used by Benton."

This is a gross misstatement of the evidence and the facts in this case, and we hope and believe it was not intentionally made by Mr. Bowie. There is not one word of testimony going to support such a statement.

Permit me in this regard to refer to the transcript in this case, p. 75, testimony of Mr. Benton.

> "Q. As a matter of fact, lumber delivered by you under this contract is still in the yards of Kelley & Company? A. Yes sir. Q. Up to this very date? A. At Cottonwood; yes sir. Q. Did you see it on yesterday? A. I saw it yesterday when we came by Cottonwood."

In conclusion I will say that the relief asked for by plaintiffs in error, that the Judgment be reversed with instructions to the lower Court to enter Judgment in favor of plaintiffs in error for $3,173.54 would be most inequitable and unjust, and that the decision of the lower Court should be sustained.